Supreme Court, U.S.
FILED

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No. _____

IN THE
Supreme Court of the United States

JOSEPH STROUD AND JOVON BROADCASTING,
WJYS-TV 62/34,
Petitioners,

v.

JERRI BLOUNT,
Respondent.

On Petition For Writ Of Certiorari To
The Appellate Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court below erred in affirming a $2.8 million punitive damages award under *BMW* and *State Farm*, where the court quantified the ratio of punitive to compensatory relief by counting attorneys' fees as compensatory damages, in conflict with this Court's and the Utah Supreme Court's decisions in *State Farm*.

2. Whether the court below erred in rejecting the applicability of the *Noerr-Pennington* doctrine to petitioning of law enforcement officials that is constitutionally protected under the First Amendment, based on rationales that conflict with the decisions of this Court and the federal courts of appeals and otherwise merit this Court's review.

LIST OF PARTIES

All parties to the proceeding are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

Petitioner Joseph Stroud is an individual.

Petitioner Jovon Broadcasting, WJYS-TV 62/34, is an Illinois corporation. Jovon Broadcasting, WJYS-TV 62/34 has no parent corporation. No publicly held company owns ten percent or more of its stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. Factual Background 2

B. Procedural Background 4

REASONS FOR GRANTING THE WRIT 9

I. By Treating Attorneys' Fees as Compensatory Damages When Assessing the Constitutionality of Punitive Damages, the Decision Below Creates a Conflict of Authority and Adds to the Confusion in the Lower Courts. 13

II. The Illinois Court's Refusal to Apply *Noerr-Pennington* Creates Significant Conflicts of Authority and Otherwise Merits This Court's Review. 23

CONCLUSION 37

APPENDIX A

Blount v. Stroud, 915 N.E.2d 925 (Ill. App. Ct. 2009) (Illinois Appellate Court Opinion Under Review, As Modified Upon Denial of Rehearing On October 6, 2009) 1a

APPENDIX B

Blount v. Stroud, 395 Ill. App. 3d 8 (Ill. App. Ct. 2009) (Illinois Appellate Court Original Opinion Of June 24, 2009, Subsequently Amended And Superseded) 50a

APPENDIX C

Blount v. Stroud, 924 N.E.2d 454 (Ill. 2010) (Illinois Supreme Court January 27, 2010 Order Denying Petitioners' Petition For Leave To Appeal) 92a

APPENDIX D

Blount v. Stroud, No. 109370 (Illinois Supreme Court Order Denying Petitioners' Motion For Leave To File A Motion For Reconsideration) (April 5, 2010) 93a

APPENDIX E

Blount v. Stroud, No. 01-L-002330 (Illinois Trial Court Opinion Denying Defendant's Post-Trial Motion for Judgment Notwithstanding The Verdict, New Trial, And/Or Remittitur) (July 28, 2006) 95a

APPENDIX F

Blount v. Stroud No. 01-L-002330 (Illinois Trial Court Opinion Granting Plaintiff's Petition for Attorneys' Fees and Expenses) (Sept. 15, 2006) 112a

APPENDIX G

Constitutional and Statutory Provisions 120a

TABLE OF AUTHORITIES

CASES

A Fisherman's Best, Inc. v. Recreational Fishing Alliance, 310 F.3d 183 (4th Cir. 2002) 31

Action Marine, Inc. v. Continental Carbon, Inc., 481 F.3d 1302 (11th Cir. 2007) 21

Alexander v. National Farmers Organization, 687 F.2d 1173 (8th Cir. 1982) 36

Amerigraphics, Inc. v. Mercury Casualty Co., 107 Cal. Rptr. 3d 307 (Cal. Ct. App. 2010) 21

Baker v. National State Bank, 801 A.2d 1158 (N.J. Super. App. Div. 2002) 19

Bayou Fleet, Inc. v. Alexander, 234 F.3d 852 (5th Cir. 2000) 26

BE&K Construction Co. v. NLRB, 536 U.S. 516 (2002) 25, 27, 30, 33, 34

Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983) 23

Blount v. Stroud, 376 Ill. App. 3d 935 (2007) 7

Blount v. Stroud, 232 Ill. 2d 302 (2009) 7

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) 8, 14, 17, 20

Bowen v. Massachusetts, 487 U.S. 879 (1988) 15

Brownsville Golden Age Nursing Home, Inc. v. Wells, 839 F.2d 155 (3d Cir. 1988) 28

Bryant v. Military Department, 597 F.3d 678 (5th Cir. 2010) 26, 30

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 23, 30

Campbell v. State Farm Mutual Automobile Insurance Co., 98 P.3d 409 (Utah 2004) 18

Cardtoons, L.C. v. Major League Baseball Players Ass'n, 208 F.3d 885 (10th Cir. 2000) 28, 32

Cheminor Drugs, Ltd. v. Ethyl Corp., 168 F.3d 119 (3d Cir. 1999) 31

City of Cleveland v. Cleveland Electric Illuminating Co., 734 F.2d 1157 (6th Cir. 1984) 35

City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365 (1991) 30

Commissioner v. Banks, 543 U.S. 426 (2005) 16

Continental Trend Resources, Inc. v. OXY USA Inc., 101 F.3d 634 (10th Cir. 1996) 22

Covad Communication Co. v. Bell Atlantic Corp., 398 F.3d 666 (D.C. Cir. 2005) 30-31

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 23, 30

Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008) 14

Feminist Women's Health Center, Inc. v. Mohammad, 586 F.2d 530 (5th Cir. 1978) 35

Fisher Tool Co. v. Gillet Outillage, 530 F.3d 1063 (9th Cir. 2008) 30

Franklin v. Gwinnett County Public School, 503 U.S. 60 (1992) 15

Gallatin Fuels, Inc. v. Westchester Fire Ins. Co., 244 F. App'x 424 (3d Cir. 2007) 20

Gaylor v. United States, 74 F.3d 214 (10th Cir. 1996) 33

GF Gaming Corp. v. City of Black Hawk, 405 F.3d 876 (10th Cir. 2005) 31

Hall v. Cole, 412 U.S. 1 (1973) 17

Hutto v. Finney, 437 U.S. 678 (1978) 17

International Brotherhood of Teamsters, Local 734 v. Philip Morris Inc., 196 F.3d 818 (7th Cir. 1999) 31

Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 130 S. Ct. 1605 (2010) 16

Knology, Inc. v. Insight Communications Co., 393 F.3d 656 (6th Cir. 2004) 31

Landgraf v. USI Film Products, 511 U.S. 244 (1994) 16

Laymon v. Lobby House, Inc., 613 F. Supp. 2d 504 (D. Del. 2009) 18

Major v. Western Home Insurance Co., 87 Cal. Rptr. 3d 556 (Cal. Ct. App. 2009) 21

McDonald v. Smith, 472 U.S. 479 (1985) 28, 29

MCI Communications Corp. v. American Telephone & Telegraph, 708 F.2d 1081 (7th Cir. 1983) 33

New West, L.P. v. City of Joliet, 491 F.3d 717 (7th Cir. 2007) 27

Parexel International Corp. v. Feliciano, No. 04-CV-3798, 2008 WL 5101642 (E.D. Pa. Dec. 3, 2008) 18-19

Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49 (1993) 24, 27, 30

Sanghvi v. City of Claremont, 328 F.3d 532 (9th Cir. 2003) 26

St. Luke Evangelical Lutheran Church, Inc. v. Smith, 568 A.2d 35 (Md. 1990) 22

State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003) 8, 14, 15, 17

Sun Pacific Farming Co-op., Inc. v. Sun World International, Inc., No. 1:01-CV-6102, 2009 WL 900751 (E.D. Cal. Mar. 31, 2009) 18

Telecor Communications, Inc. v. Southwestern Bell Telephone Co., 305 F.3d 1124 (10th Cir. 2002) 35-36

Theme Promotions, Inc. v. News America Marketing FSI, 546 F.3d 991 (9th Cir. 2008) 27

TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993) 20

United Mine Workers of America v. Pennington, 381 U.S. 657 (1965) 23, 30, 33

United States Football League v. National Football League, 634 F. Supp. 1155 (S.D.N.Y. 1986) 35

Video International Production, Inc. v. Warner-Amex Cable Communications, Inc., 858 F.2d 1075 (5th Cir. 1988) 28

Webb v. Utah Tour Brokers Ass'n, 568 F.2d 670 (10th Cir. 1977) 36

Weit v. Continental Illinois National Bank & Trust Co. of Chicago, 641 F.2d 457 (7th Cir. 1981) 35

West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83 (1991) 16

White v. Lee, 227 F.3d 1214 (9th Cir. 2000) 30

Willow Inn, Inc. v. Public Service Mutual Insurance Co., 399 F.3d 224 (3d Cir. 2005) 20

STATUTES

720 ILCS 5/14-2(a) 3

28 U.S.C. § 1257(a) 1

42 U.S.C. § 1981 2

42 U.S.C. § 1981a(b)(2) 16
42 U.S.C. § 1988 ..... 2, 16
42 U.S.C. § 1988(b) 16

OPINIONS BELOW

The order of the Supreme Court of Illinois denying Petitioners' petition for leave to appeal is reported at 924 N.E.2d 454 and reproduced at Pet. App. 92a. The order of the Supreme Court of Illinois denying Petitioners' subsequent motion for leave to file a motion for reconsideration of denial of leave to appeal is unreported and reproduced at Pet. App. 93a. Orders and opinions of the Supreme Court of Illinois on an earlier appeal in this case are reported at 882 N.E.2d 76, 884 N.E.2d 159, and 904 N.E.2d 1.

The amended and superseding opinion of the Illinois Appellate Court for which review is sought is reported at 915 N.E.2d 925 and reproduced at Pet App. 1a-49a. An earlier, superseded opinion of the Appellate Court is reported at 877 N.E.2d 49 and reproduced at Pet. App. 50a-91a. An opinion of the Appellate Court on an earlier appeal, subsequently reversed and remanded by the Illinois Supreme Court, is reported at 395 Ill. App. 3d 8.

The pertinent orders and opinions of the trial court are unreported and are reproduced at Pet. App. 95a-119a.

JURISDICTION

The Supreme Court of Illinois denied a timely motion for leave to appeal on January 27, 2010. Pet. App. 92a. On April 12, 2010, Justice Stevens granted Petitioners' application for an extension of time for filing their petition for certiorari to and including June 25, 2010. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §§ 1981 and § 1988, which are set forth in full at Pet. App. 120a-23a.

STATEMENT OF THE CASE

A. Factual Background

Respondent Jerri Blount was an employee from 1993 until 2000 at Petitioner Jovon Broadcasting, WJYS-TV 62/34, a television station owned by Petitioner Joseph Stroud. Pet. App. 3a. Jovon Broadcasting focuses on religious and community programming in the Chicago area. *Id.* at 4a-5a. Blount was originally hired as a program screener but was later promoted to local programming-time sales manager for the station. *Id.* at 3a. Both Blount and Stroud are African-American. *Id.*

In 2000, another employee at Jovon Broadcasting, Bonnie Fouts (a Caucasian woman), filed a complaint with the Equal Employment Opportunity Commission against Stroud and the station claiming that she had been racially and sexually harassed by her supervisor at WJYS-TV. *Id.* Blount claims that she had several conversations with Stroud about her decision to support Fouts in the latter's discrimination suit. *Id.*

Unbeknownst to Stroud, Blount was secretly recording these and other conversations in the workplace in violation of Illinois criminal law. *Id.* at 11a. Blount recorded business meetings, sales calls,

and private conversations between Stroud and others, including a U.S. Congressman. Blount's employment was terminated in the fall of 2000.

Much later, in 2001, Stroud discovered that Blount had secretly recorded the earlier conversations. He then brought a civil action against Blount for eavesdropping in violation of an Illinois criminal statute. *Id.* The state circuit court judge presiding over the civil eavesdropping case entered a temporary restraining order enjoining Blount from using the tape recordings. *Id.* The judge also expressed concern that a criminal violation had occurred and advised Stroud to consult with the State's Attorney. Trial Tr. 21-24 (Nov. 21, 2005).[1]

Stroud and several Jovon employees who had been secretly tape-recorded by Blount later lodged criminal complaints against Blount with the Tinley Park Police Department alleging eavesdropping. Pet. App. 12a. Stroud also consulted with former Illinois Attorney General (now U.S. Senator) Roland Burris about pressing criminal charges against Blount. Burris contacted the State Attorney's office on Stroud's behalf, but the State's Attorney ultimately decided not to prosecute Blount. *Id.* at 12a-13a.

Stroud and Blount eventually settled the civil eavesdropping lawsuit, with Stroud agreeing not to

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[1] Illinois law requires the consent of all participants to a conversation before that conversation may be legally recorded. *See* 720 ILCS 5/14-2(a) (stating the elements of an eavesdropping offense).

pursue the matter further and Blount agreeing to abide by the temporary restraining order preventing her from using the content of the tape recordings.

B. Procedural Background

1. In February 2001, Blount filed this lawsuit against Stroud and Jovon Broadcasting, ultimately asserting twelve different claims for relief. Nine of those claims were dismissed before or during trial, and Blount thus proceeded to the jury on three claims: retaliatory discharge,[2] intentional infliction of emotional distress, and defamation. Pet. App. 4a. Blount sought both compensatory and punitive damages.

At trial, Blount testified that after she informed Stroud of her decision to support Fouts in her discrimination lawsuit, Stroud said and did certain things that Blount perceived to be threats against her. Pet. App. 9a. Blount testified that she developed anxiety attacks as a result, which in turn caused an infected esophagus. *Id.* Blount also testified as to alleged racially charged statements by Stroud regarding her decision as an African-American to support a Caucasian in a discrimination lawsuit against an African-American. *Id.* at 8a.

Stroud and other witnesses disputed this testimony. Jovon employees stated that Blount had been terminated not for the decision to support Fouts, but rather because Blount had been misdirecting business to a competitor. Pet. App. 10a.

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[2] Blount brought her retaliatory discharge claim under both 42 U.S.C. § 1981 and Illinois common law.

Stroud denied ever threatening Blount and expressed his belief that the actions by Fouts and Blount were a conspiracy to extort money from the station. *Id.* at 9a. Stroud agreed, however, that he had questioned Blount's decision to support Fouts by asking "how a black person could side with a white person against a black person." *Id.* at 7a.

Over Stroud's objection, the trial court permitted Blount to introduce extensive testimony concerning Stroud's efforts to press criminal charges against Blount for eavesdropping. *Id.* at 39a. The efforts of Stroud and other Jovon employees to petition the police and the State's Attorney took place a full two years after Blount had been terminated, but the court nonetheless concluded that this evidence was somehow relevant to whether Stroud had a retaliatory motive for discharging Blount years earlier. *Id.* Stroud contended not only that the evidence was irrelevant, but also that his efforts to pursue criminal charges against Blount were lawful petitioning of the government protected by the First Amendment and that admission of this evidence was contrary to the *Noerr-Pennington* doctrine. *Id.* The court disagreed, and the jury was permitted to hear extensive testimony from various witnesses, including a police officer and now-Senator Roland Burris, regarding Stroud's pursuit of criminal charges against Blount. *Id.* at 12a, 39a.[3]

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[3] Before trial, Petitioners also sought to exclude evidence relating to Stroud's *civil* eavesdropping suit, but the court rejected Petitioners' motions. Pet. App. 37a-38a. However, Petitioners do not seek review in this Court of the state courts'

2. At the end of trial, the jury returned a verdict rejecting Blount's claims of defamation and intentional infliction of emotional distress, but finding in favor of Blount on her retaliatory discharge claim. The jury awarded Blount $25,000 in damages for physical and/or emotional pain and suffering, $257,350 in back pay, and $2,800,000 in punitive damages. *Id.* at 13a.

Blount subsequently moved for attorneys' fees under 42 U.S.C. § 1988, arguing that she had been a prevailing party on her retaliatory discharge claim under 42 U.S.C. § 1981. *Id.* at 113a. Blount sought all of her fees from the start of the case for her pursuit of all twelve claims, in addition to all of her fees from the civil eavesdropping suit initiated by Stroud, for a total of $1,182,832.10. *Id.* Ten months after the jury returned its verdict, and over Petitioners' objection, the trial court awarded Blount all of the fees she claimed. *Id.* at 115a, 118a.

Petitioners filed a post-trial motion seeking judgment notwithstanding the verdict, or in the alternative, remittitur of the verdict because the harm to Blount was not substantial enough to warrant punitive damages at all and because the amount of punitive damages was unreasonable under the Due Process Clause. *Id.* at 97a. As

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rulings allowing admission of evidence about the civil eavesdropping suit. Rather, they seek review of the state courts' rulings allowing admission of evidence about pursuit of criminal charges. The decision under review expressly found that Petitioners had preserved their objections to the rulings concerning the criminal complaints. *Id.* at 39a.

Petitioners argued, and Respondent conceded, the jury's verdict represented a ratio of almost 10:1 in punitive to compensatory damages. Petitioners also argued that the verdict was the product of numerous evidentiary errors, including the admission of evidence in violation of the *Noerr-Pennington* doctrine regarding the pursuit of criminal charges against Blount. *Id.* at 103a-04a; 108a-09a. The trial court denied the motion. *Id.* at 110a.

3. Petitioners timely appealed. The Appellate Court originally reversed the jury's verdict on subject matter jurisdiction grounds. *See Blount v. Stroud,* 376 Ill. App. 3d 935 (2007). The Illinois Supreme Court initially denied Blount's motion for leave to appeal, but then reversed course, granted discretionary review, and reversed and remanded the Appellate Court's decision that had vacated the judgment. *See Blount v. Stroud,* 232 Ill. 2d 302 (2009). The state Supreme Court instructed the Appellate Court to consider Stroud's other allegations of error, including those regarding punitive damages and evidentiary errors, on remand.

This time, the Appellate Court affirmed the trial court judgment.[4] Pet. App. 3a. The court recognized that the analysis of whether a punitive damages award comports with due process is governed by this

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[4] On remand, after the Appellate Court issued an initial decision affirming the trial court, Petitioners moved for rehearing, and then the Appellate Court issued an amended and superseding opinion. The amended and superseding decision is the judgment as to which review is sought in this Court, and is therefore cited here.

Court's decisions in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), and *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). *Id.* at 24a-25a. The Appellate Court likewise acknowledged this Court's caution that a punitive damages "award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety" and that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* at 28a-29a. (quoting *State Farm*, 538 U.S. at 425).

However, the court found that the award here did not approach the constitutionally suspect zone established in *State Farm* and *BMW*, because the court rejected the parties' shared view that there was a 10:1 ratio between the jury's $2.8 million punitive damages award and its $282,350 compensatory award ($25,000 for physical and/or emotional pain and suffering and $257,350 in back pay). *Id.* at 29a. Rather, the court added the $1,182,832.10 in attorneys' fees the trial judge had awarded to Blount to the compensatory damages side of the ratio – fees which the relevant statute expressly defines as "costs," not damages. *Id.* at 34a; *infra* at 16-17. By thus inflating the compensatory award, the Appellate Court concluded that the ratio of punitive to compensatory damages was less than 2:1, which the court viewed as "well within the permissible guideline." *Id.* at 34a.

The court likewise rejected Petitioners' argument that the admission of evidence regarding Stroud's pursuit of criminal eavesdropping charges against

Blount violated the *Noerr-Pennington* doctrine. The court held that it would "decline to extend the applicability of the *Noerr-Pennington* doctrine to provide immunity from retaliation claims." *Id.* at 41a-42a. The court further held that *Noerr-Pennington* was inapplicable here because Stroud's efforts to obtain redress through the criminal justice system had already ceased at the time of trial, and therefore could not be deterred by using evidence about it against Petitioners at trial. *Id.* at 43a. Finally, the court held that *Noerr-Pennington* did not bar admission of the evidence to show Stroud's state of mind years before the petitioning occurred, as opposed to directly penalizing that petitioning. *Id.* at 44a.

After the Appellate Court issued its amended and superseding decision, *see supra* note 4, Petitioners timely petitioned the Illinois Supreme Court for leave to appeal, which was denied. *Id.* at 92a.[5]

REASONS FOR GRANTING THE WRIT

The decision below rides roughshod over two fundamental constitutional rights that are critical to protecting against impassioned jury verdicts. Both issues merit this Court's review under its established standards for granting certiorari.

1. The inclusion of court-awarded attorneys' fees as compensatory damages for purposes of calculating the ratio of punitive to compensatory relief under

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[5] Pursuant to Illinois procedures, Petitioners sought leave to file a motion for reconsideration of the denial of discretionary review, which was also denied. Pet. App. 93a-94a.

BMW and *State Farm* is a critically important issue that merits this Court's review now. The Court has repeatedly recognized that the quantitative ratio of punitive damages to compensatory relief is a key factor for testing the constitutionality of the amount of punitive damages. Here, a proper calculation without attorneys' fees yields a ratio of 10:1. That ratio pushes up against or beyond the outermost boundary of what is permissible, and could be affirmed, if at all, only in the most extreme case under the other *BMW* and *State Farm* factors, which the lower court did not and could not find here. Instead, the court upheld the punitive award by counting the later-awarded attorneys' fees as compensatory damages, contrary to the governing statutory definition of the attorneys' fees as "costs." The court thereby transformed a ratio of 10:1 into a ratio of less than 2:1, and concluded that this lower ratio could be justified under the other *BMW* and *State Farm* factors.

As this alchemy shows, allowing attorneys' fees to be factored into the punitive-compensatory ratio easily results in manipulation of the *BMW* and *State Farm* analytical framework and renders this critical part of the due process test all but meaningless. The extreme importance of this issue is therefore beyond dispute. The issue is also ripe for the Court's consideration. The decision below directly conflicts with the decision of the Utah Supreme Court and, at least implicitly, the decision of this Court, in *State Farm*. The Utah high court recognized that this Court excluded attorneys' fees from compensatory damages when calculating the ratio in *State Farm*,

and held that such exclusion is therefore mandated under this Court's decision. The court below held just the opposite.

In addition, the need for review is intensified by disarray among federal appellate courts concerning whether and when attorneys' fees may be factored into the *BMW* and *State Farm* analysis. Some courts permit attorneys' fees to be counted as compensatory damages only when they are awarded by the jury as part of the plaintiff's substantive cause of action. Other courts, like the court below, allow attorneys' fees to be counted even when they are awarded by the court after the jury's verdict. And some courts take the opposite tack by considering attorneys' fees on the punitive side of the equation, recognizing the traditionally punitive nature of fee-shifting statutes.

Without a uniform approach to this issue, the quantitative guideposts set by this Court's punitive damages decisions provide no guidance at all, and the limitation under the Due Process Clause on arbitrary and extreme punitive damages awards is rendered an empty promise. In light of the direct conflict of authority with the Utah Supreme Court and this Court in *State Farm*, and the disarray among other courts, this Court should grant certiorari to provide the needed guidance now.

2. The state court's cavalier disregard of Petitioners' fundamental rights under the First Amendment and *Noerr-Pennington* also merits this Court's review. The First Amendment protects Petitioner Stroud's right to petition law enforcement authorities, and *Noerr-Pennington* implements that

protection by barring states from imposing civil liability or punishment on the basis of such lawful petitioning. Taking a scattershot approach to this constitutional guarantee, the court below upheld the use of evidence of Petitioners' lawful petitioning against them at trial on three bases, each of which is worthy of review.

First, the court held that *Noerr-Pennington* does not apply to retaliation claims. That ruling directly conflicts with decisions of this Court and multiple courts of appeals. Indeed, given the constitutional roots of *Noerr-Pennington*, it makes no sense to hold that liability for lawful petitioning may be imposed merely by pleading a particular type of claim.

Second, the court held that *Noerr-Pennington* does not apply because Stroud's petitioning had already ceased at the time of trial, and therefore could not be thwarted by using evidence of it against him. Again, that ruling directly conflicts with decisions of this Court and the courts of appeals, which have repeatedly applied *Noerr-Pennington* to completed acts of petitioning. *Noerr-Pennington* and the First Amendment would provide scant protection for petitioning if it could be penalized as soon as it ends. The chilling effect of such a rule is patent.

Third, the court held that *Noerr-Pennington* does not apply because liability was not directly imposed on the basis of Stroud's petitioning; rather, Stroud's communications with law enforcement authorities were offered as "evidence of his retaliatory animus" years before the petitioning occurred. Unlike the lower court's first two grounds for rejecting *Noerr-*

Pennington, this rationale does not create a conflict of authority. It nonetheless merits the Court's review, particularly in light of the other certworthy issues presented. No conflict of authority is ever likely to develop on this issue, because the approach taken by the court below appears to find sanction in dicta in a footnote in the Court's decision in *Pennington*. Unlike in this case, the issue was not actually presented in *Pennington*, or apparently in any other case decided by this Court. The decades-old *Pennington* footnote exposes constitutionally protected petitioning to indirect punishment where, as here, evidence about the petitioning can be used to inflame the passions of a jury to impose not only civil liability, but massive punitive damages. Although this Court is not bound by its own dicta, the lower courts ordinarily view themselves as obligated to adhere to it. Thus, only this Court can revisit the issue to determine whether the *Pennington* dicta comports with the present-day understanding of the First Amendment right at issue.

I. By Treating Attorneys' Fees as Compensatory Damages When Assessing the Constitutionality of Punitive Damages, the Decision Below Creates a Conflict of Authority and Adds to the Confusion in the Lower Courts.

This Court's decisions have firmly established that punitive damages are constitutionally constrained by the Due Process Clause, and that the ratio of punitive damages to compensatory damages is a key factor in the constitutional analysis. The Court's decisions in *BMW* and *State Farm* require "courts reviewing punitive damages to consider three

guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *State Farm*, 538 U.S. at 418; *accord BMW*, 517 U.S. at 575-76.

Accordingly, the Court has recently described the "ratio between compensatory and punitive damages" – the second *BMW* and *State Farm* factor – as a "central feature in our due process analysis," the significance of which is "indisputable." *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2629 (2008). While the Court has "consistently rejected the notion that the constitutional line is marked by a simple mathematical formula," *BMW*, 517 U.S. at 582, it has also stressed that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process," and that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee," *State Farm*, 538 U.S. at 425; *see also id.* ("In *Haslip*, in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety").

Whether and how an award of attorneys' fees should be factored into the punitive-versus-compensatory ratio is critical to this proportional analysis – as this case vividly illustrates. Here, the

jury awarded plaintiff compensatory relief of approximately $280,000 and punitive damages of $2.8 million – a 10:1 ratio that could only be constitutionally upheld, if at all, in the most extraordinary case.[6] But ten months after the jury returned that verdict, the trial court itself awarded approximately $1.2 million in attorneys' fees – a fee award that was already almost five times greater than the jury's compensatory award. If the attorneys' fees awarded after the fact by the court can be added to the jury's compensatory award before comparing the latter to the jury's punitive damages award, then the ratio of punitive to compensatory damages can easily be manipulated to justify astronomical punitive damages out of all proportion to the actual harm found by the jury, rendering the second factor of *BMW* and *State Farm* essentially meaningless.[7]

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[6] Indeed, the compensatory damages awarded here already include a component for emotional pain and suffering, which, as the Court explained in *State Farm*, incorporates a punitive element. *State Farm*, 538 U.S. at 426. Moreover, the bulk of the award was for backpay, which this Court has recognized is an equitable remedy. *See Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 (1992); *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988). Further, because the court below determined that the punitive to compensatory ratio was less than 2:1, it did not conclude – and, on this record, could not have concluded – that a 10:1 ratio is constitutionally permissible here.

[7] That is especially true where – as in this case – attorneys' fees can be artificially inflated. As noted above, here the state court awarded fees to Respondent for all twelve of her claims against Petitioners *plus* her fees for the civil eavesdropping suit against her – even though *Petitioners* prevailed on all but one

The state court's analytical approach is indefensible on the merits. This Court has emphasized that "[a]ttorney's fee determinations . . . are 'collateral to the main cause of action' and 'uniquely separable from the cause of action to be proved at trial.'" *Landgraf v. USI Film Prods.*, 511 U.S. 244, 277 (1994) (quoting *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 451-52 (1982)); *see also, e.g., Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1630 (2010) (describing attorneys' fees as "in addition to actual damages"); *Comm'r v. Banks*, 543 U.S. 426, 438 (2005) (describing "court-awarded attorney's fees" as separate from "a plaintiff's monetary recovery"). In this very case, the attorneys' fees were awarded by the court ten months after the jury returned its verdict and was discharged.

Indeed, the statutory basis for the fee award here, 42 U.S.C. § 1988, expressly defines attorneys' fees as "costs" of litigation. 42 U.S.C. § 1988(b); *see also* 42 U.S.C. § 1981a(b)(2) (specifically excluding attorneys' fees from definition of "compensatory damages"); *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 88 (1991), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (stating that under 42 U.S.C. § 1988, "[t]he record of statutory usage demonstrates convincingly that attorney's fees and expert fees are regarded as

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of Respondent's claims, and effectively prevailed in the civil eavesdropping suit, too. Pet. App. 112-19a. Then that inflated attorneys' fee award was added to the jury-awarded compensatory award (which it dwarfed) to justify an enormous award of punitive damages.

separate elements of litigation cost"). Under this characterization as costs, attorneys' fees should be disregarded altogether in quantifying the ratio of punitive to compensatory awards.

In addition, attorneys' fees may properly be viewed as punitive in nature. In examining statutes that shift a prevailing party's fees such as the one at issue here, the Court has observed that "the underlying rationale of 'fee shifting' is, of course, punitive." *Hall v. Cole*, 412 U.S. 1, 5 (1973); *see also, e.g., Hutto v. Finney*, 437 U.S. 678, 691 & n.17 (1978). Under this formulation, attorneys' fees should be counted on the *punitive* side of the ratio, since they already punish the defendant above and beyond what is necessary to compensate the plaintiff. In no event, however, should fees awarded by the court be counted as compensatory under the second *BMW* and *State Farm* factor.

BMW and *State Farm* drive this point home. In *BMW*, the Court compared the punitive damages award to the amount of "actual harm *as determined by the jury*." *BMW*, 517 U.S. at 582 (emphasis added). Similarly, in *State Farm*, the Court stated that "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to *the general damages recovered.*" *State Farm*, 538 U.S. at 426; *see also id.* at 425-26 (repeatedly referring to the "ratio between punitive and compensatory damages" and similar formulations). Following the approach of *BMW* and *State Farm*, the comparison must be strictly between the jury's actual compensatory award and its punitive award. Thus,

the Illinois' court's inclusion of court-awarded attorneys' fees in the denominator is contrary to the Court's approach in these cases.

As the Utah Supreme Court observed on remand in *State Farm*, this Court did *not* include attorneys' fees on the compensatory side for purposes of the due process comparison in that case. The Utah court explained that, "fairly read, the [U.S.] Supreme Court's opinion forecloses consideration of a compensatory damages number other than the $1,000,000 awarded by the jury," and concluded therefrom that "attorney fees" may not be "included as part of the denominator in calculating a ratio between compensatory and punitive damages." *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 419 (Utah 2004). In addition, the Utah Supreme Court independently rejected consideration of attorneys' fees within the federal due process framework as unmanageable. *Id.* at 420 ("To consider attorney fees and expenses in awarding punitive damages also invites unnecessary conceptual and practical complications to an already complex enterprise").[8]

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[8] Many state and federal trial courts have reached the same conclusion. *See, e.g., Laymon v. Lobby House, Inc.*, 613 F. Supp. 2d 504, 515 (D. Del. 2009) (holding that attorneys' fees awarded under 42 U.S.C. § 1988 may not be considered part of denominator in due-process ratio); *Sun Pac. Farming Co-op., Inc. v. Sun World Int'l, Inc.*, No. 1:01-cv-6103, 2009 WL 900751, at *7 (E.D. Cal. Mar. 31, 2009) ("No consideration may be given to the amount of costs recovered, attorneys fees, which were not recovered, or any sum other than the compensatory damages actually awarded to calculate the *State Farm* ratio."); *Parexel*

Thus, the decision below *directly* conflicts with the decisions of both this Court and the Utah Supreme Court in *State Farm*. That conflict, combined with the central importance of the question presented for judicial administration of the constitutional rule, plainly makes this issue appropriate for the Court's review.

The need for review is further amplified by disarray in the federal appellate courts regarding the correct approach to this issue. Contrary to the ruling of the Utah Supreme Court in *State Farm*, different courts have permitted inclusion of attorneys' fees in compensatory damages for comparison to the amount of punitive damages, under varying conditions and on varying rationales. Still other courts have considered attorneys' fees on the punitive side of the equation when performing the due process analysis. The lack of uniform approach to this question necessitates this Court's review.

Like the Illinois court in this case, the Third Circuit has included attorneys' fees as part of the compensatory calculation in the ratio analysis even

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Int'l Corp. v. Feliciano, No. 04-cv-3798, 2008 WL 5101642, at *6 (E.D. Pa. Dec. 3, 2008) ("[T]he Court disagrees with Plaintiff's use of attorney's fees" to inflate the denominator of the due process ratio.); *Baker v. Nat'l State Bank*, 801 A.2d 1158, 1168 (N.J. Super. App. Div. 2002) (holding that for purposes of calculating the due-process ratio, "there is no reason to consider attorney fees to be part of compensatory damages.... Traditionally, an award of attorney fees is not considered to be compensatory, but provided, as a policy matter in specific types of cases, to remedy the problem of unequal access to the courts").

when awarded by the court as collateral relief. In *Willow Inn, Inc. v. Public Service Mutual Ins. Co.*, 399 F.3d 224 (3d Cir. 2005), the trial judge awarded the plaintiff $2,000 in compensatory damages and $150,000 in punitive damages, plus attorneys' fees and costs, which it later quantified as $135,000. *Id.* at 227. The Third Circuit held that the $150,000 punitive award should be measured not against the original $2,000 compensatory award, but rather against the total of the compensatory award plus the later award of fees and costs, which reduced the ratio from an eye-popping 75:1 to a far more acceptable 1:1. *Id.* at 236-37; *see also, e.g., Gallatin Fuels, Inc. v. Westchester Fire Ins. Co.*, 244 F. App'x 424, 437 (3d Cir. 2007) (holding that attorneys' fee "award can be considered as part of the 'harm or potential harm' when considering the constitutionality of the punitive damages award").[9]

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[9] When counting attorneys' fees as part of compensatory damages, some decisions have relied on language regarding "potential harm" in the plurality opinion in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993). *See, e.g., Gallatin*, 244 F. App'x at 437. But the "potential harm" referenced by the *TXO* plurality included only harm that would have been compensable in jury-awarded compensatory damages had the defendant's scheme succeeded – not attorneys' fees. *See* 509 U.S. at 461 (potential harm consisted of defendant's attempt to obtain unlawful "multimillion dollar reduction in its potential royalty obligation"). The Court has since made clear that *TXO* provides no basis for inflating the jury's actual compensatory award in circumstances like that here, where the defendant's alleged wrongful conduct is complete and the plaintiff is not "threatened with any additional potential harm." *BMW*, 517 U.S. at 582.

The Eleventh Circuit has also held that attorneys' fees can be considered as part of the denominator – but only when the fees are awarded by a jury and state law provides that they are compensatory in nature. In *Action Marine, Inc. v. Continental Carbon, Inc.*, 481 F.3d 1302 (11th Cir. 2007), the court held that under the applicable state law, "awards of attorney fees in tort cases involving bad faith are compensatory in nature," and therefore that it would "include the attorney fees as part of the measure of actual damages for the necessary comparison" between punitive and compensatory damages. *Id.* at 1321. Thus, the Eleventh Circuit counts attorneys' fees that are part of the jury's award as compensatory damages for purposes of the due process ratio analysis.[10]

The Tenth Circuit has taken a different approach that considers whether punitive damages are sufficient to cover attorneys' fees where there is no

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[10] California courts follow the same approach with respect to so-called *Brandt* fees awarded by the jury as compensatory damages in bad-faith insurance cases. *Compare, e.g., Major v. Western Home Ins. Co.*, 87 Cal. Rptr. 3d 556, 579 (Cal. Ct. App. 2009) ("*Brandt* fees are considered extra-contractual tort damages that compensate a plaintiff for an insurer's bad faith refusal to pay policy benefits" and "[a]ccordingly, the amount of the jury's award of *Brandt* fees in this case may be properly considered ... in determining if the ratio of punitive damages to the tort damages award is excessive"), *with Amerigraphics, Inc. v. Mercury Cas. Co.*, 107 Cal. Rptr. 3d 307, 329 (Cal. Ct. App. 2010) ("the trial court properly excluded the amount of *Brandt* fees in determining the compensatory damages award, since the *Brandt* fees were awarded by the court after the jury had already returned its verdict on the punitive damages").

fee-shifting statute. In *Continental Trend Resources, Inc. v. OXY USA Inc.*, 101 F.3d 634 (10th Cir. 1996), where no attorneys' fees as such were awarded by the jury or judge, the court of appeals considered whether the award of punitive damages was "sufficient to cover plaintiff's reasonable costs of litigation with enough left over to reward plaintiffs for pursuing a case the jury obviously thought justified significant punishment." *Id.* at 643; *see also id.* at 641-42. The Tenth Circuit's approach thereby recognizes that attorneys' fees are essentially punitive, not compensatory. At the same time, its approach would not permit a large punitive damages award in a case like this, where attorneys' fees have already been separately awarded by the trial judge pursuant to a fee-shifting statute. *Cf. St. Luke Evangelical Lutheran Church, Inc. v. Smith*, 568 A.2d 35, 40-42 (Md. 1990) (recognizing punitive character of fee-shifting, and surveying multiple states' treatment of attorneys' fees as punitive or compensatory under state law).

Given this array of approaches, and the conflict of the decision below with the decisions of this Court and the Utah Supreme Court in *State Farm*, the Court should grant review to provide critically needed guidance to state and federal courts carrying out their constitutionally mandated review of punitive damages awards. As cases like this one and the Third Circuit's decision in *Willow Inn* demonstrate, if the numbers can be manipulated by adding in amounts – such as attorneys' fees – that were not awarded by the jury to compensate the plaintiff's harm, then the punitive-compensatory

ratio becomes meaningless as a factor in due process review. This issue merits the Court's immediate review to provide the needed guidance to the lower courts going forward.

II. The Illinois Court's Refusal to Apply *Noerr-Pennington* Creates Significant Conflicts of Authority and Otherwise Merits This Court's Review.

The Appellate Court's *Noerr-Pennington* rulings likewise merit review. Under the *Noerr-Pennington* doctrine, "effort[s] to influence public officials" cannot support liability "regardless of intent or purpose." *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 (1965); *see Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). The Court has always recognized that *Noerr-Pennington* is rooted in the First Amendment right to petition: "The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so." *Noerr*, 365 U.S. at 139. It is therefore well-established that *Noerr-Pennington* extends beyond its original application as a gloss on the Sherman Act to other causes of action. *E.g.*, *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983). It is no less well-established that the doctrine protects petitioning aimed at the courts, as well as lobbying executive and legislative officials. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

Importantly, *Noerr-Pennington* protects even petitioning that has been rejected on the merits, unless it was so baseless as to constitute "sham" petitioning, which exists only where litigation is *both* "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits" *and* is "subjectively motivated" by an intent to misuse "governmental *process* – as opposed to the *outcome* of that process" – to achieve an unlawful purpose. *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-61 (1993) ("*PRE*") (internal quotation marks omitted).

Here, it is plain that Petitioner Stroud's efforts to press charges for Respondent's apparent violation of Illinois's criminal eavesdropping laws were legitimate petitioning of police and prosecutorial officials that is protected by the First Amendment. Indeed, although the Appellate Court referenced the "sham" litigation exception to *Noerr-Pennington* in its initial decision affirming the judgment (but without stating whether it thought the petitioning here was in fact a "sham"), *see* Pet. App. 86a, the Court removed any reference to the "sham" exception in its amended and superseding opinion issued after Petitioners sought rehearing. *See id.* at 37a-47a. It is therefore plain that the Appellate Court did not ultimately view these efforts to press criminal charges as a "sham." Nor could it have, given that it was the judge in the civil eavesdropping action who instructed Jovon employees to pursue criminal charges.

Nonetheless, the Appellate Court offered three purported grounds for rejecting the applicability of

Noerr-Pennington here. Collectively, the rationales offered by the court below give stunningly short shrift to the fundamental First Amendment right to petition government officials. Each of those three *Noerr-Pennington* rulings merits this Court's review in its own right.

1. As the first basis for its decision, the court below held that *Noerr-Pennington* is categorically inapplicable to retaliation claims. Pet. App. 41a-42a. That ruling conflicts with decisions of this Court and the courts of appeals and is patently wrong on the merits.

The decision of the court below conflicts with the Court's own application of *Noerr-Pennington* to retaliation claims analogous to Respondent's claim here. On two occasions, the Court has applied *Noerr-Pennington* to retaliation claims under the National Labor Relations Act ("NLRA"). In *Bill Johnson's*, the Court addressed whether the National Labor Relations Board ("NLRB") could enjoin an employer from proceeding with a lawsuit against picketers, on the ground that the lawsuit constituted impermissible retaliation for activities protected under the NLRA. The Court applied the *Noerr-Pennington* doctrine to bar such an injunction as long as the suit was not a baseless one. *Bill Johnson's*, 461 U.S. at 740-44. And in *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002), the Court made clear that constitutional protection under *Noerr-Pennington* extends to at least some unsuccessful lawsuits motivated by a retaliatory purpose after the lawsuits were completed. *Id.* at 532. Ultimately, the Court avoided the need to

delimit the precise class of retaliatory suits protected under the First Amendment by adopting a construction of the NLRA limiting the NLRB's power to bring retaliation claims. *Id.* at 536. But the applicability of *Noerr-Pennington* to retaliation claims forms the background principle of the entire decision.

The ruling below likewise conflicts with decisions of the courts of appeals applying *Noerr-Pennington* to claims that petitioning activity constituted unlawful retaliation. In *Sanghvi v. City of Claremont*, 328 F.3d 532 (9th Cir. 2003), the Ninth Circuit applied *Noerr-Pennington* to retaliation claims brought under 42 U.S.C. § 1983 and under the Fair Housing Act, stressing that *Noerr-Pennington* "is grounded in our democratic form of government." 328 F.3d at 542-43. And in *Bayou Fleet, Inc. v. Alexander*, 234 F.3d 852 (5th Cir. 2000), the Fifth Circuit addressed a possible *Noerr-Pennington* defense to claims under multiple causes of action. 234 F.3d at 861-62. Noting that the plaintiff sought "a new exception to the *Noerr-Pennington* doctrine based on a defendant's retaliatory conduct," the Fifth Circuit stressed that this Court "ha[d] not established a separate exception to the *Noerr-Pennington* doctrine" for such conduct, and it "declined to create a new exception" itself. *Id.* at 862; *see also Bryant v. Military Department*, 597 F.3d 678, 689, 693-94 (5th Cir. 2010) (applying *Noerr-Pennington* to claim of "retaliatory litigation" under 42 U.S.C. § 1985(1), and noting the Fifth Circuit's continuing refusal to create a retaliation exception to the doctrine).

Indeed, it is particularly dangerous to leave legitimate petitioning of judicial or law enforcement authorities unprotected from the possibility of retaliation liability. Legal action is nearly always motivated by some animus towards the opposing party, or by some desire to cause the opposing party harm. *See BE&K*, 536 U.S. at 534; *PRE*, 508 U.S. at 69 (Stevens, J., concurring in the judgment) ("We may presume that every litigant intends harm to his adversary"). It would scarcely be consistent with the First Amendment to leave open the possibility that the act of genuinely seeking relief from a court might later be deemed impermissible "retaliation" for some prior exercise of a protected right.

In addition to the conflict of authority with respect to whether *Noerr-Pennington* applies specifically to retaliation claims, the Illinois court's decision to exempt such claims from the reach of *Noerr-Pennington* highlights confusion as to the proper approach toward determining the kinds of claims to which *Noerr-Pennington* applies. The vast majority of appellate courts that have addressed the issue have recognized that *Noerr-Pennington* applies broadly to all causes of action. "[B]ecause *Noerr-Pennington* protects federal constitutional rights, it applies in all contexts." *Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1007 (9th Cir. 2008); *see also, e.g., New West, L.P. v. City of Joliet*, 491 F.3d 717, 722 (7th Cir. 2007) (recognizing that *Noerr-Pennington* "is today understood as an application of the first amendment's speech and petitioning clauses" applicable to claims under the Fair Housing Act, 42 U.S.C. § 1982, and 42 U.S.C. §

1983); *Video Int'l Prod., Inc. v. Warner-Amex Cable Commc'ns, Inc.*, 858 F.2d 1075, 1084 (5th Cir. 1988) (applying *Noerr-Pennington* to claims under common law and under 42 U.S.C. § 1983, and stating that "[t]here is simply no reason that a common-law tort doctrine can any more permissibly abridge or chill the constitutional right of petition than can a statutory claim such as antitrust"); *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155, 160 (3d Cir. 1988) (applying *Noerr-Pennington* to common law tort claims). Under these courts' reasoning, it is impermissible to exclude retaliation claims from *Noerr-Pennington*'s compass.

However, like the state court below, at least one federal court of appeals has rejected the broad reach required by *Noerr-Pennington*'s constitutional underpinnings. In an en banc ruling, the Tenth Circuit held that *Noerr-Pennington* immunity as such is confined to the antitrust context, and that immunity from other forms of liability for petitioning under the First Amendment is narrower than *Noerr-Pennington*. *See Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 208 F.3d 885, 888-94 (10th Cir. 2000) (en banc). Thus, although the narrow approach of the decision below conflicts with the overwhelming weight of authority, other courts – including an en banc federal court of appeals – have made essentially the same error. That heightens the need for this Court's review.

Further, both the Illinois court and the Tenth Circuit rested their narrow view of *Noerr-Pennington* in part on this Court's decision in *McDonald v. Smith*, 472 U.S. 479 (1985), which

rejected a Petition Clause defense to a defamation suit without mentioning *Noerr-Pennington*. Properly read, *McDonald* is entirely consistent with the broad reach of *Noerr-Pennington* because the decision simply rejected the extravagant theory that the Petition Clause *absolutely* protects *all* petitioning from defamation claims – even when that petitioning is both objectively baseless and subjectively motivated by malice (and therefore is unprotected under *Noerr-Pennington*). *See id.* at 485. Nonetheless, as the decision below and *Cardtoons* illustrate, some of the language of *McDonald*, and its failure even to mention *Noerr-Pennington*, can be misconstrued as rejection of the broad reach of *Noerr-Pennington* that has been recognized by virtually every other court. That further highlights the need for this Court's review to correct this misinterpretation of its own decision.

2. The Illinois appellate court also ruled that *Noerr-Pennington* does not apply here because Stroud's petitioning of criminal law enforcement authorities had ended before the trial in this case. The court reasoned that Respondent's introduction of evidence relating to past petitioning could not "thwart the right to seek redress in the court system or through the criminal justice system" because "the State's Attorney [had already] decided that there were no grounds to charge Blount criminally." Pet. App. 43a. The court apparently thought that basing liability in part on petitioning activity could not chill such petitioning after it was over. Indeed, the court stated (incorrectly) that "[t]he *Noerr Pennington* doctrine is usually raised as a defense where one

party seeks to enjoin another from bringing a suit. Thus, when the party to be enjoined has had his day in court, those concerns are no longer present." *Id.* at 42a (citations omitted).

That rationale is patently incorrect and conflicts with countless other decisions. While it is true that *Bill Johnson*'s addressed an attempt to enjoin ongoing petitioning, that application of *Noerr-Pennington* represents the exception, not the rule. Most of this Court's *Noerr-Pennington* cases involve attempts to impose monetary liability based on past petitioning. *See Noerr*, 365 U.S. at 129-30; *Pennington*, 381 U.S. at 659-61; *California Motor Transport*, 404 U.S. at 509-12; *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 368-69 (1991); *PRE*, 508 U.S. at 53. Indeed, *BE&K* itself stated unequivocally that even if First Amendment concerns are at their zenith when prior restraints on speech are involved, "this analogy at most suggests that injunctions may raise greater First Amendment concerns, not that after-the-fact penalties raise no concerns." *BE&K*, 536 U.S. at 530.

Not surprisingly, then, numerous courts of appeals, in conflict with the Illinois court, have had no trouble applying *Noerr-Pennington* to shield petitioning activity that already has come to a close. *See, e.g., Fisher Tool Co. v. Gillet Outillage*, 530 F.3d 1063, 1069 (9th Cir. 2008) (applying *Noerr-Pennington* to shield completed unsuccessful suit for patent infringement); *White v. Lee*, 227 F.3d 1214, 1231-33 (9th Cir. 2000) (applying *Noerr-Pennington* to shield unsuccessful zoning-related lawsuit); *Bryant*, 597 F.3d at 693-94 (same); *Covad Commc'ns*

Co. v. Bell Atl. Corp., 398 F.3d 666, 670, 677 (D.C. Cir. 2005) (applying *Noerr-Pennington* to shield completed unsuccessful suit for patent infringement); *Knology, Inc. v. Insight Commc'ns Co.*, 393 F.3d 656, 657-59 (6th Cir. 2004) (applying *Noerr-Pennington* to shield state court litigation that had concluded by the time of court of appeals' decision); *A Fisherman's Best, Inc. v. Recreational Fishing Alliance*, 310 F.3d 183, 187-94 (4th Cir. 2002) (applying *Noerr-Pennington* to completed lobbying activities); *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119, 120-27 (3d Cir. 1999) (applying *Noerr-Pennington* to administrative anti-dumping complaint filed but then withdrawn); *GF Gaming Corp. v. City of Black Hawk*, 405 F.3d 876, 883-84 (10th Cir. 2005) (applying *Noerr-Pennington* to completed lobbying activity); *Int'l Bhd. of Teamsters, Local 734 v. Philip Morris Inc.*, 196 F.3d 818, 826 (7th Cir. 1999) (Easterbrook, J.) (applying *Noerr-Pennington* to past "statements . . . designed to influence Congress"). Notably, these and other decisions have come not only in antitrust cases, but also in cases raising a variety of statutory and common-law claims.

The mere fact that petitioning has concluded does not mean that it somehow no longer deserves protection. It would eviscerate *Noerr-Pennington* if protected petitioning activity could not be enjoined while ongoing but, once completed, could freely form the basis for liability. Under such a rule, constitutionally protected petitioning would plainly be chilled by the threat of monetary liability after the petitioning ends. And that concern is all the more salient for efforts to petition judicial or law

enforcement officials, rather than a legislature – for a litigant frequently has a preexisting adversarial relationship with the opposing party, and thus has special reason to fear that protected petitioning activity will leave that litigant on the receiving end of a further lawsuit. As noted, while prior restraints certainly pose special concerns under the First Amendment's Speech Clause, penalties imposed for past speech are scarcely less problematic. Holding that petitioning is unprotected once it has already taken place would overturn long-settled constitutional precedents.

Nonetheless, the Appellate Court below is not alone in making this fundamental error. Paralleling its narrow claim-specific view of the scope of *Noerr-Pennington*, the Tenth Circuit's en banc decision in *Cardtoons* fundamentally restricts *Noerr-Pennington*'s protection against after-the-fact monetary liability for completed petitioning outside the antitrust context. Reasoning that *PRE*'s "sham petitioning" standard applies only to antitrust claims as a gloss on the Sherman Act, the Tenth Circuit held that there are no constitutional limits on after-the-fact damages liability for objectively reasonable lawsuits. *Cardtoons*, 208 F.3d at 890 n.4. The same error in the decision below requires review and correction by this Court.

3. Finally, the Illinois court rejected Petitioners' *Noerr-Pennington* claim on the ground that Petitioners were not directly held liable for protected activity but, instead, that protected activity was used as evidence of retaliatory intent years before the petitioning took place. Pet. App. 43a-44a. In the

court's view, that posture automatically meant that there was no *Noerr-Pennington* problem. That holding, too, merits this Court's review.

In *Pennington*, the Court stated in a footnote: "It would of course still be within the province of the trial judge to admit [evidence of protected activity], if he deemed it probative and not unduly prejudicial, under the 'established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny.'" *Pennington*, 381 U.S. at 670 n.3. That statement was pure dicta, however, as no such evidentiary use was at issue in the case. The Court has never subsequently addressed, in an actual holding, the extent to which evidence of protected petitioning activity may be used at trial against the person who engaged in such activity. The Court is, of course, not bound by its own prior dicta in *Pennington*. *See, e.g.*, *BE&K*, 536 U.S. at 528 ("exercising our customary refusal to be bound by dicta") (internal quotation marks omitted). But the lower courts do generally view themselves constrained to follow such dicta unless and until repudiated by this Court itself. *E.g.*, *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996). Indeed, courts of appeals have followed the *Pennington* footnote dicta. *See, e.g.*, *MCI Commc'ns Corp. v. AT&T*, 708 F.2d 1081, 1160 (7th Cir. 1983). Thus, no circuit split is likely ever to develop with respect to this question, in view of the *Pennington* dicta.

This issue plainly presents an important question of federal constitutional law that the Court should address in this case, where it is actually presented – particularly in light of the other issues discussed above that independently merit the Court's review. The Court's dicta in the *Pennington* footnote creates serious tension with the principle that protected petitioning activity cannot form the basis of liability. Even if such activity is used only as evidence of intent as to other matters, that still is a significant burden. Indeed, petitioning activity will almost certainly be unduly chilled if it could later be used to demonstrate a would-be petitioner's unlawful intent as to other matters.

That is especially true in the context of retaliation claims. As noted, legal action is almost always motivated by some animus toward or desire to harm the opposing party. *See BE&K*, 536 U.S. at 534; *PRE*, 508 U.S. at 69 (Stevens, J., concurring in the judgment). Thus, constitutionally protected petitioning in the form of a lawsuit or criminal complaint would always expose the petitioner to potential liability when, as in this case, it is used as evidence in a retaliation countersuit. The would-be exception discussed in the *Pennington* footnote dicta thereby threatens to swallow the *Noerr-Pennington* rule of immunity for such exercises of the constitutional right to petition the courts or criminal justice officials for redress.

At a minimum, the legal standard applied below is wrong because such evidence may be admitted, if at all, under the First Amendment only upon a heightened showing that its probative value

outweighs the chilling effect on constitutional rights. As one district court explained, "the exclusion of 'purpose and character' evidence consisting of conduct clearly embraced by *Noerr-Pennington* should be the rule rather than the exception .... Although Rule 403 requires that evidence should be excluded only if its probative value is 'substantially outweighed' by its prejudicial effect, evidence which by its very nature chills the exercise of First Amendment rights is properly viewed as presumptively prejudicial." *United States Football League v. Nat'l Football League*, 634 F. Supp. 1155, 1181 (S.D.N.Y. 1986) (internal citations omitted). Several courts of appeals have recognized the same thing. *See Weit v. Cont'l Ill. Nat'l Bank & Trust Co. of Chicago*, 641 F.2d 457, 467 (7th Cir. 1981) (upholding exclusion of evidence of petitioning activity because its admission "could easily result in a finding of antitrust liability for engaging in the First Amendment right to petition which *Noerr-Pennington* protects"); *Feminist Women's Health Center, Inc. v. Mohammad*, 586 F.2d 530, 543 n.7 (5th Cir. 1978) (ruling that admissibility of *Noerr-Pennington* evidence "should be governed by a test that weighs the probativeness of and the plaintiff's need for the evidence against the danger that admission of the evidence will prejudice the defendant's first amendment rights"); *City of Cleveland v. Cleveland Electric Illuminating Co.*, 734 F.2d 1157, 1163-64 (6th Cir. 1984) (relying on *Feminist Women's Health Center* in upholding exclusion of *Noerr-Pennington* evidence); *cf. Telecor Commc'ns, Inc. v. S.W. Bell Tel. Co.*, 305 F.3d 1124,

1138 (10th Cir. 2002) (upholding admission of *Noerr-Pennington* evidence but stressing cautionary instruction given to jury regarding plaintiffs' "right under the Constitution to petition the government").[11]

This case drives that home. Evidence concerning Petitioners' constitutionally protected petitioning was used to inflame the passions of the jury, resulting in a grossly disproportionate punitive damages award that dwarfed any actual damages. The probative value of this evidence was negligible at best, given that it was offered as evidence of Stroud's alleged retaliatory intent in discharging Blount — an action that took place a full two years before the criminal complaints were lodged. And the prejudicial impact on Stroud's exercise of the constitutional right to petition was stark and powerful. But the Illinois court refused to recognize that the right to petition was in any way implicated here, based on the spurious rationales discussed above. As a result, it treated the evidence of protected petitioning activity as categorically admissible. Review by this Court is needed to provide clarification, forty-five years after the *Pennington* footnote, as to whether and when such evidence is admissible.

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[11] On the other hand, other federal appellate decisions – like the decision below – have treated the inquiry as little more than a garden-variety relevance analysis. *See, e.g., Webb v. Utah Tour Brokers Ass'n*, 568 F.2d 670, 672 (10th Cir. 1977); *Alexander v. Nat'l Farmers Org.*, 687 F.2d 1173, 1196 (8th Cir. 1982).

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDIX

INDEX

Appendix A

Blount v. Stroud, 915 N.E.2d 925 (Ill. App. Ct. 2009) (Illinois Appellate Court Opinion Under Review, As Modified Upon Denial of Rehearing On October 6, 2009) 1a

Appendix B

Blount v. Stroud, 395 Ill. App. 3d 8 (Ill. App. Ct. 2009) (Illinois Appellate Court Original Opinion Of June 24, 2009, Subsequently Amended And Superseded) 50a

Appendix C

Blount v. Stroud, 924 N.E.2d 454 (Ill. 2010) (Illinois Supreme Court January 27, 2010 Order Denying Petitioners' Petition For Leave To Appeal) 92a

Appendix D

Blount v. Stroud, No. 109370 (Illinois Supreme Court Order Denying Petitioners' Motion For Leave To File A Motion For Reconsideration) (April 5, 2010) 93a

Appendix E

Blount v. Stroud, No. 01-L-002330 (Illinois Trial Court Opinion Denying Defendant's Post-Trial Motion for Judgment Notwithstanding The Verdict, New Trial, And/Or Remittitur) (July 28, 2006) 95a

Appendix F
Blount v. Stroud No. 01-L-002330 (Illinois Trial Court Opinion Granting Plaintiff's Petition for Attorneys' Fees and Expenses) (Sept. 15, 2006) 112a

Appendix G
Constitutional and Statutory Provisions 120a

APPENDIX A

Appellate Court of Illinois,
First District, Second Division.

Jerri BLOUNT, Plaintiff-Appellee,
v.
Joseph STROUD, an Individual, and Jovon Broadcasting, WJYS-TV 62/34, an Illinois Corporation, Defendants-Appellants.

Nos. 1-06-2428, 1-06-2968.

Oct. 6, 2009.

MODIFIED UPON DENIAL OF REHEARING

Justice THEIS delivered the opinion of the court:

Following a jury trial, defendants Jovon Broadcasting and Joseph Stroud, the owner and operational manager of Jovon Broadcasting, were found liable for retaliation against plaintiff Jerri Blount, a former employee of Jovon Broadcasting. The jury awarded Blount a total of $3,082,350 in damages, which was comprised of $257,350 for back pay, $25,000 for physical and/or emotional pain and suffering, and $2,800,000 in punitive damages. The court also awarded Blount $1,182,832.10 in attorney fees and costs. On appeal, defendants contend that: (1) the trial court erred in denying their motion for judgment notwithstanding the verdict because Blount's retaliation claim was preempted by the

Illinois Human Rights Act (12775 ILCS 5/1-101 *et seq.* (West 2006)); (2) the trial court erred in denying their motion for judgment notwithstanding the verdict because Blount's retaliation claim was not cognizable under section 1981 of the United States Civil Rights Act of 1991 (42 U.S.C. § 1981 (2000)); (3) the trial court erred in awarding Blount attorney fees; (4) the trial court erred in submitting Blount's request for punitive damages to the jury; (5) the jury's award of $2,800,000 in punitive damages is excessive; and (6) the trial court erred in denying defendants' motion for a new trial where certain evidentiary errors committed during the trial unfairly prejudiced defendants and tainted the jury's verdict.

In 2007, we found that the circuit court lacked the subject matter jurisdiction to entertain Blount's retaliation claim under section 8-111(C) of the Human Rights Act (775 ILCS 5/8-111(C) (West 2006)) and reversed the jury's verdict without addressing the remaining issues raised by defendants. *Blount v. Stroud,* 376 Ill. App. 3d 935 (2007). The supreme court then reversed our decision, finding that the Human Rights Act did not present a jurisdictional bar to Blount's retaliation claim, whether it was a common law claim or a claim under section 1981 of the United States Civil Rights Act of 1991 (42 U.S.C. § 1981 (2000)), because the Human Rights Act only addressed claims articulated expressly pursuant to that scheme. *Blount v. Stroud,* 232 Ill. 2d 302, 317-18 (2009). The supreme court accordingly remanded this cause to us to address

defendants' remaining contentions. For the reasons that follow, we now affirm the judgment entered by the circuit court.

The record discloses the following facts and procedural history relevant to this appeal. In her complaint, as amended, Blount alleged the following. Blount, an African American woman, was employed by Jovon Broadcasting, a Chicago area television station, from 1993 until she was terminated in October 2000. At the time of her termination, Blount was the local programming time sales manager. Stroud, who is African-American, owned Jovon and managed all of its operations. Bonnie Fouts, a Caucasian-American woman discharged from employment at Jovon in 2000, filed a charge of discrimination with the United States Equal Employment Opportunity Commission (the EEOC), in which she claimed that she had been the victim of racial and sexual harassment. After being given the right to sue by the EEOC, Fouts filed a civil rights lawsuit in the United States District Court against Stroud and Jovon. Blount witnessed the racial discrimination and sexual harassment of Fouts and agreed to testify on Fouts' behalf.[1] Blount claimed that she was discharged from Jovon on October 19, 2000, in retaliation for the fact that she had agreed to testify on behalf of Fouts.

Blount claimed that this retaliation was actionable under both the common law tort of retaliatory discharge and section 1981 of the Civil

[1] Fouts ultimately settled her case against defendants.

Rights Act of 1991 (42 U.S.C. § 1981 (2000)). Specifically, regarding the Civil Rights Act claim, Blount alleged that defendants harassed her, intimidated her, and terminated her employment because she agreed to "support" Fouts and to testify on her behalf in her race and sex discrimination suit. Blount alleged that these actions of defendants interfered with her "at will employment contract," and were a violation of section 1981. In her common law claim, Blount alleged that Jovon wrongfully terminated her in violation of Illinois public policy because she refused to perjure herself to protect defendants in the Fouts matter. Blount also asserted claims for defamation and intentional infliction of emotional distress against both defendants.

The circuit court ultimately conducted a jury trial of Blount's claims of retaliation, defamation, and intentional infliction of emotional distress. Because defendants do not contest the sufficiency of the evidence to support the jury's verdict in this appeal, we will merely present the evidence relevant to the issues raised.[2]

Stroud testified as an adverse witness that he and his wife, Yvonne, are the sole shareholders of Jovon, which is a small television broadcasting corporation. Jovon operates WJYS, Channel 62, in the Chicago area. WJYS broadcasts primarily religious programs, infomercials, and other advertisements. WJYS also broadcasts "community-

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[2] Additional facts will be set forth below as relevant to the evidentiary issues raised by defendants.

based programs" and "local ministry programs." Stroud insisted that Jovon is a diverse workplace that is not operated on a racial basis.

However, Cathy Harden, Stroud's executive assistant, testified that there were discussions at the firm about the need to "hire more whites." Harden also described Stroud as having a bad temper. Harden, who is Caucasian, was also teased about being "white" and having "made it through" more than a week at Jovon.

Blount testified that Stroud hired her in 1993 to work as a program screener. After several years, Stroud promoted Blount to the sales department. There, Blount was responsible for selling air time to infomercial broadcasters. In addition to her salary, Blount was paid a commission on accounts she brought to the station which was based on how much air time she sold them. In May 2000, Stroud made Blount his local sales manager, which meant that at least four other sales representatives reported to her. At that time, Blount was Jovon's "best" salesperson, generating approximately $2 to $3 million in revenue for WJYS annually. As a result, Blount, who was a single mother of two, was earning roughly $250,000 a year.

Bonnie Fouts testified that she began working at WJYS in March of 1999. She began in the traffic department, which monitored broadcasts to make sure that the correct programming was being aired at the correct times. In January 2000, Rick Howell, who was the only other employee in the traffic

department at the time, began to act in a "hostile" manner toward Fouts. He made inappropriate comments to her, calling her racial and sexual epithets such as "white girl" and "white bitch." When Fouts asked Howell to stop addressing her in that manner, Howell told her that he was her manager and that he could speak to her in any way he wished.

Fouts informed Stroud of Howell's behavior in the spring of 2000. Stroud initially offered Fouts money for her "pain and suffering and anguish." Fouts told Stroud that she did not want money; she wanted the harassment to stop. However, it did not. Fouts repeatedly spoke with Stroud, whom she characterized as a "very angry man with a bad temper," and asked him to intercede, but he did nothing. In April of 2000, Stroud moved Fouts to another department at Jovon, but the harassment did not stop. Fouts had several more discussions with Stroud about Howell's behavior. Fouts also began sending Stroud letters requesting that he do something about Howell's treatment of her, which Stroud admitted that he received. However, Stroud never discharged or disciplined Howell.

Stroud terminated Fouts's employment on August 24, 2000. Fouts felt that she was fired from a job that she "really liked" because she was being racially and sexually harassed and she reported that harassment. Fouts subsequently filed a charge of race and sex discrimination with the EEOC.

Stroud testified that on October 13, 2000, he received notice of Fouts' EEOC charge. Although Stroud believed that the charge was merely "legalese," he called a meeting of managers the same day. Only African-American managers attended the meeting. At that meeting, Blount indicated that she would be "supporting" Fouts in her charge of racial and sexual discrimination because she had witnessed Howell refer to Fouts numerous times as a "white bitch." Stroud admitted that he responded to Blount by stating that he did not understand "how a black person could side with a white person against a black person." Stroud also admitted that he stated that Fouts had placed the jobs of everyone at Jovon at risk by filing the EEOC charge. Stroud further stated that there was no place for independent opinions at his company.

Rick Howell testified that the charges levied by Fouts were "fictitious." He denied referring to Fouts as the "white bitch" and denied that Stroud said anything about a "black person siding with a white person" at the meeting. Howell maintained that Fouts was treated well by everyone at Jovon, but she "played the race card."

Blount and Stroud testified that several days after the meeting, they went for a walk together to discuss Blount's involvement in the Fouts matter. Stroud testified that during this conversation, he never told Blount to lie about what happened with Fouts. Blount testified that Stroud asked her what she was "going to say in regards to Bonnie [Fouts]," and she responded that she would not lie. Stroud

responded that he did not "get it," and called her an "ignorant nigger." Stroud also told her that she should not "side with" Fouts because "white people" have "done nothing for her," and because she should do what he told her to do.

Stroud then gave Blount a photograph of himself with President Clinton. Stroud had signed the photograph and told her that it could be her "key" to getting work at any television station she wanted because she knew the man who was "sitting there with the president" in the photograph. Stroud also told her that the photograph would make "a powerful statement." Stroud denied giving Blount this photograph, but later admitted doing so once he was shown that he had signed it and addressed it to her. Stroud explained that the picture was taken while he was on a trip to Africa with President Clinton, based on which Stroud donated several hundred thousand dollars for H.I.V. relief. Stroud added that he had been invited on the trip by Rev. Jesse Jackson. Stroud described President Clinton as a friend and stated that he was on the board of trustees of the Bill Clinton Presidential Library. Stroud gave Blount the photograph because he was proud of it and because he wanted to make Blount proud; he denied giving it to her to show that he had "friends in high places."

Blount then admonished Stroud for having witnessed the harassment of Fouts and having done nothing. Blount testified that this made Stroud "irate." According to Blount, Stroud then started screaming at her and told her that she needed to

know who she was "up against," asserting that he was "one of the richest niggers in the world," and that she did not know who she was "fucking with." Stroud also stated that he could cause her "to cease to exist."

On another occasion shortly thereafter, they began to discuss the Fouts matter again, and Stroud became "belligerent and crazed." He told her again that he could cause her "not to exist." Blount became frightened of Stroud based on these comments, which she perceived as threats. Although Stroud would often yell and scream at her, Stroud had never threatened her like this before. Blount then began to suffer "severe anxiety attacks," from which she developed an infected esophagus.

However, in his testimony, Stroud denied threatening Blount. Rather, Stroud believed that the actions by Fouts and Blount were a conspiracy to extort money from the station. Stroud explained that he had done "so much" for Blount by hiring her and training her to be a successful salesperson that he felt Blount "betrayed" him, which made him "very angry." Stroud also believed that Blount's attorney had "put her up" to taking this position against him. Stroud described the whole situation as a "conspiracy" by Blount, Fouts, and their attorneys. Stroud added that if the Federal Communications Commission learned that WJYS discriminated on the basis of race, it could lose its broadcasting license. Stroud also admitted that he knew it was illegal to fire someone in retaliation for testifying.

Six days after receiving Fouts' charge, Stroud suspended Blount's employment. Stroud explained that he made this decision because Rick Howell, who was also his nephew, told him that Blount went around Jovon telling people that the station was "hers." Stroud also said that Ted France, another sales person, advised him that Blount had directed business to a competitor. However, Stroud admitted that he did not have proof that Blount diverted business. Stroud also believed that Blount did not have respect for him and that she was not organized. Shortly after he suspended Blount, Stroud terminated her employment. Blount never returned to work after her suspension, and Stroud never paid her any further wages. Stroud terminated her employment on November 20, 2000. Blount commenced the present action on February 23, 2001.

Several months after her termination from Jovon, Blount was hired by Affiliated Media. During her first three years there, she earned between roughly $57,000 and $90,000, which was less than half what she was earning at Jovon.

Nevertheless, at least a year after Blount filed this action, Stroud offered Blount the opportunity to return to work for him as an independent contractor. Blount testified that Stroud also asked her to "forget about the lawsuit," meaning the present suit, and told her that she should come back to work for him because he "didn't want to see [her] and [her] boys fall over a cliff." Stroud also told Blount that he had paid her "so much money" and that "Bonnie didn't pay your bills" and "get you on the other side of

Harlem." Stroud gave her a check for $10,000, which Stroud testified was for "future services." Blount admitted that she cashed the check, but explained that she did so because she believed she was owed the money for sales commissions that she had not been paid prior to her termination. Blount did not return to work for Jovon.

Sometime in the latter half of 2001, after the present suit was filed, Stroud learned that Blount had been surreptitiously recording their conversations since as early as September 2000. Blount testified that she had done so because she wanted proof that Stroud had told her to perjure herself and had threatened that she would "cease to exist" if she did not.

In September 2001, Stroud sued Blount civilly for eavesdropping. Stroud testified that he did so because he wanted to "let her suffer some of the consequences that I am suffering," and because "there would be consequences for her," which may cause her to withdraw her retaliation lawsuit. Although the circuit court judge presiding over the civil eavesdropping case entered a temporary restraining order enjoining Blount from divulging the tape recordings, Blount was never found liable for eavesdropping.[3]

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[3] This court's review of the records of the clerk of the circuit court of Cook County discloses that the eavesdropping suit was ultimately voluntarily dismissed pursuant to agreed order subsequent to the trial in this matter.

Stroud nevertheless believed that Blount's actions were criminal and also pursued the filing of criminal charges against Blount. Officer Michael O'Connell of the Tinley Park police department testified that Stroud and several other individuals from Jovon filed criminal complaints alleging eavesdropping. However, Officer O'Connell explained that it was the role of the Cook County State's Attorney to determine whether or not to file criminal charges against Blount, and ultimately, the State's Attorney decided not to pursue charges against Blount.

Stroud also retained former Illinois Attorney General Roland Burris in 2002 for "legal consulting services" regarding the matter. Stroud stated that he paid Burris $10,000 for his consulting services in how criminal charges could be filed against Blount. Stroud further stated that an additional $10,000 would have been paid to Burris if these efforts were "successful."

Roland Burris also testified in this trial that Stroud contacted him for advice regarding "a potential criminal matter." Stroud told Burris that he had tried to get the Tinley Park police to investigate "a possible eavesdropping incident." Stroud asked Burris to contact the Tinley Park police to determine whether charges would be filed. Burris spoke with the police chief, who advised him that this was the State's Attorney's decision. Burris then spoke with the assistant State's Attorney handling the matter, who advised him that he was still looking into whether to pursue charges. Several weeks later, the assistant State's Attorney called Burris back and

informed him that there were no grounds to prosecute. Burris related this information to Lonnie Radcliffe, the executive vice-president of Jovon, and advised him that if the prosecuting body decided not to pursue charges, there was nothing that Stroud or Jovon could do to pursue Blount criminally.

Following the conclusion of the evidence, the court instructed the jury on defamation, intentional infliction of emotional distress, and a single claim of retaliation predicated on both Blount's "support" for Fouts's claim as well as her refusal to commit perjury. The court also gave the jury the pattern instruction on punitive damages (Illinois Pattern Jury Instructions, Civil, No. 35.01 (2005 ed.)). Following deliberations, the jury returned a verdict in favor of Blount on her retaliation claim and in favor of defendants on the defamation and intentional infliction of emotional distress claims. The jury awarded Blount $257,350 in back pay, $25,000 for physical and/or emotional pain and suffering, and $2.8 million in punitive damages. The court subsequently awarded Blount $1,182,832.10 in attorney fees under section 1988 of the Civil Rights Act (42 U.S.C. § 1988 (2000)).

Thereafter, defendants filed a posttrial motion contending, *inter alia*, that they were entitled to a judgment notwithstanding the verdict and/or remittitur because the harm to Blount was not substantial enough to warrant punitive damages, the amount of the punitive damages awarded was unreasonable, and because the verdict was the product of numerous evidentiary errors, including

the admission of evidence illegally obtained via eavesdropping. The circuit court denied the motion. Defendants subsequently filed this timely appeal.

As noted, in 2007, we reversed the jury's verdict after finding that the circuit court lacked subject matter jurisdiction over Blount's retaliation claim under the Illinois Human Rights Act (775 ILCS 5/1-101 et seq. (West 2006)). The supreme court subsequently reversed our decision and remanded the cause to us to consider defendants' remaining contentions on appeal. *Blount v. Stroud,* 232 Ill. 2d 302 (2009).

Therefore, we begin by addressing defendants' second argument, in which they claim they are entitled to judgment notwithstanding the verdict because Blount's retaliation claim was not cognizable under section 1981 of the United States Civil Rights Act of 1991 (42 U.S.C. § 1981 (2000)). Specifically, defendants maintain that a retaliation claim is not contemplated by section 1981 and that, therefore, the jury's verdict in favor of Blount cannot stand as a matter of law. Defendants do not contest the sufficiency of Blount's evidence to support such a claim if it is cognizable under section 1981.

Section 1981 guarantees that all people within the United States have the same right as "white citizens" in every state and territory to make and enforce contracts. 42 U.S.C. § 1981 (2000); *see also Domino's Pizza, Inc. v. McDonald,* 546 U.S. 470, 474, 126 S. Ct. 1246, 1249, 163 L. Ed. 2d 1069, 1075 (2006) (discussing section 1981). Thus, in order to

state a claim under section 1981, a plaintiff must establish proof of a contractual relationship or a would-be contractual relationship. *McDonald,* 546 U.S. at 476, 126 S. Ct. at 1249-50, 163 L. Ed. 2d at 1075-76. Although at-will employees lack a fixed duration of employment, there are nevertheless contractual aspects to an at-will employment relationship, such as wages, benefits, duties, and working conditions. *Walker v. Abbott Laboratories,* 340 F.3d 471, 476-77 (7th Cir. 2003). Thus, the protections of section 1981 also apply in the context of an at-will employment relationship. *Walker,* 340 F.3d at 477. Also, despite the language of section 1981, a "white citizen" can sue under the section where she has been discriminated against in favor of a racial minority. *McDonald v. Santa Fe Trail Transportation Co.,* 427 U.S. 273, 286-87, 96 S. Ct. 2574, 2582, 49 L. Ed. 2d 493, 504 (1976).

However, section 1981 does not specifically mention retaliation. See 42 U.S.C. § 1981 (2000). At the time defendants filed their brief in this cause, the circuits of the United States Courts of Appeal were split over whether section 1981, as amended by the Civil Rights Act of 1991, provided an avenue of recourse for individuals who had suffered retaliation for advocating for the rights of those protected under section 1981. *Humphries v. CBOCS West, Inc.,* 474 F.3d 387, 401 (7th Cir. 2007), citing *Foley v. University of Houston System,* 355 F.3d 333, 339 (5th Cir. 2003), *Hawkins v. 1115 Legal Service Care,* 163 F.3d 684, 693 (2d Cir. 1998), *Andrews v. Lakeshore Rehabilitation Hospital,* 140 F.3d 1405,

1412-13 (11th Cir. 1998), and *Barge v. Anheuser-Busch, Inc.*, 87 F.3d 256, 259 (8th Cir. 1996); *see also Carney v. American University*, 151 F.3d 1090, 1094-95 (D.C. Cir. 1998) (assuming, without a discussion of the issue, that section 1981 encompasses retaliation claims); *see also Humphries*, 474 F.3d at 411 (Easterbrook, J., dissenting) (concluding that "[s]ection 1981 does not offer one opening for a claim in the nature of retaliatory discharge"); *Little v. United Technologies, Carrier Transicold Division*, 103 F.3d 956, 961 (11th Cir. 1997) (concluding that because section 1981 is different from Title VII, the type of discrimination it proscribes must be different and holding that section 1981 does not encompass retaliation claims).

Since that time, the United States Supreme Court has definitively held that section 1981 does encompass retaliation claims filed by individuals who have tried to help others who have suffered racial discrimination. *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, ----, 128 S. Ct. 1951, 1961, 170 L. Ed. 2d 864, 877 (2008). Thus, Blount's retaliation claim was proper under section 1981 as a matter of law.

Defendants' third contention is similarly resolved by *CBOCS West*. Defendants claim that the trial court erred in awarding Blount attorney fees for her retaliation claim under section 1988 of the Civil Rights Act. 42 U.S.C. § 1988 (2000). Section 1988 provides the trial court with the discretion to award reasonable attorney fees to a prevailing party in a section 1981 action. 42 U.S.C. § 1988 (2000).

Defendants maintain that because Blount's claim was not legally cognizable under section 1981, section 1988 is not applicable. Defendants do not contest whether the amount of the fees awarded was reasonable but only the applicability of section 1988.

As noted above, Blount's claim was cognizable under section 1981. See *CBOCS West*, 553 U.S. at -, 128 S. Ct. at 1961, 170 L. Ed. 2d at 877. Therefore, an award of fees under section 1988 was permissible here.

Defendants' fourth contention on appeal is that the trial court erred in submitting Blount's request for punitive damages to the jury. Defendants claim that Blount failed to adduce sufficient proof of aggravated circumstances, such as willfulness, wantonness, fraud, or malice on the part of Stroud, to justify submission of the punitive damages to the jury. Defendants cite the fact that the amount of punitive damages, roughly $2.8 million, was significantly more than the amount of compensatory damages, $25,000 for physical and emotional harm and $257,350 for back pay, as an indication that punitive damages were inappropriate here.

Punitive damages may be awarded where retaliatory discharge has been committed with fraud, actual malice, deliberate violence or oppression, or when the defendant has acted willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others. *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172 (1978); *see also Loitz v. Remington Arms Co.*, 138 Ill. 2d 404, 415 (1990), quoting Restatement

(Second) of Torts § 908(2), at 464 (1979) ("'Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others'"). Thus, "willful and wanton" misconduct "'approaches the degree of moral blame attached to intentional harm.'" *Loitz*, 138 Ill. 2d at 416, quoting *Bresland v. Ideal Roller & Graphics Co.*, 150 Ill. App. 3d 445, 457 (1986), quoting Restatement (Second) of Torts § 886A, Comment *k*, at 342 (1979). The purpose of punitive damages is not to compensate the plaintiff but, rather, to punish the defendant and to deter others from engaging in such conduct. *Bates v. William Chevrolet/Geo, Inc.*, 337 Ill. App. 3d 151, 160 (2003).

Although the amount of punitive damages to be awarded is a jury question, the preliminary question of whether the facts of a particular case justify the imposition of punitive damages is a question of law. *Kelsay*, 74 Ill. 2d at 186. We accordingly review *de novo* the trial court's decision to submit the question of punitive damages to the jury. *Gomez v. The Finishing Co.*, 369 Ill. App. 3d 711, 721 (2006).

Here, the evidence was sufficient to show that Stroud acted willfully and wantonly in retaliating against Blount. The record discloses that on numerous occasions, Stroud tried to influence Blount's decision to testify on behalf of Fouts. Stroud offered Blount money and her job back, and asked her to "forget about" this lawsuit. Stroud also asserted his wealth, power, and connections, giving Blount a picture of himself with President Clinton

and telling her that she did not know who she was "fucking with." Stroud also tried to use his connections to have Blount prosecuted criminally for eavesdropping, contacting Roland Burris to attempt to make that happen. Stroud did this to make her "suffer" some of the same consequences that he had "suffered" in having to defend a lawsuit with the objective of getting her to back down. However, most significantly, Stroud threatened Blount on more than one occasion, telling her that he could cause her to "cease to exist." Blount perceived these comments as threats on her life.

The record also discloses that Stroud consciously disregarded the rights of Fouts and Blount. Despite Fouts's requests, Stroud failed to do anything regarding Howell's treatment of Fouts. When he later received her EEOC charge, he dismissed it as "legalese." Stroud also admitted that he knew it was "illegal" to fire someone in retaliation for testifying. Although Stroud testified that he terminated Blount because of allegations that she had diverted business, Stroud admitted that he had no proof that she had done so and terminated her anyway. Stroud also offered Blount money and her job back and asked her to "forget about" this lawsuit. These facts show a conscious disregard for the rights of Blount and Fouts, as well as a sense of being above the law. It was therefore proper to submit the issue of punitive damages to the jury. *See, e.g., Hollowell v. Wilder Corp.*, 318 Ill. App. 3d 984, 989 (2001).

Further, Illinois follows the Restatement analysis of punitive damages. See *Loitz*, 138 Ill. 2d at 415-16.

Thus, even if it could be said that the compensatory damages awarded were "a trifling amount" in comparison to the punitive damages award, it would not mean that the punitive damages award was inconsistent or inappropriate. Restatement (Second) of Torts § 908, Comment *c* (1979). We therefore find no error in the submission of the punitive damages claim to the jury.

Defendants' fifth contention on appeal is that the amount of punitive damages awarded by the jury was excessive and should be remitted. Defendants challenge the amount of damages under the Illinois common law standard and under the federal due process standard. We will address each in turn.

The Illinois common law punitive damages inquiry is distinct from the constitutional challenge. *Franz v. Calaco Development Corp.*, 352 Ill. App. 3d 1129, 1147 (2004), citing *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 450, 121 S. Ct. 1678, 1693, 149 L. Ed. 2d 674, 696 (2001). Under the Illinois standard, once the court has determined as a matter of law that punitive damages can be awarded for a particular cause of action, it is for the jury to decide based on the evidence presented whether the defendant's conduct was sufficiently willful or wanton to warrant the imposition of punitive damages. *Cirrincione v. Johnson*, 184 Ill. 2d 109, 116 (1998). The measure of punitive damages to be awarded is also a question for the jury. *Kelsay*, 74 Ill. 2d at 186.

In reviewing a jury's award of punitive damages, relevant circumstances to consider include, but are not limited to, the nature and enormity of the wrong, the financial status of the defendant, and the potential liability of the defendant. *Deal v. Byford*, 127 Ill. 2d 192, 204 (1989). However, each case must be assessed in light of the specific facts and circumstances involved, and the underlying purpose of a punitive damage award must be satisfied. *Deal*, 127 Ill. 2d at 204.

The amount of a punitive damages award will not be reversed unless it is so excessive that it must have been a result of passion, partiality, or corruption. *Franz*, 352 Ill. App. 3d at 1139. Although the purpose of punitive damages is to punish and deter wrongful conduct, juries have been charged with their determination because they depend so closely upon the jury's fact finding. *Franz*, 352 Ill. App. 3d at 1142. Because a jury's determination of the amount of punitive damages is a predominately factual issue, we will not reverse a jury's determination as to the amount of punitive damages unless it is against the manifest weight of the evidence. *Cirrincione*, 184 Ill. 2d at 116; *Franz*, 352 Ill. App. 3d at 1145.

Here, although Stroud testified that he did not operate Jovon Broadcasting on a racial basis and denied that he tried to threaten or intimidate Blount into doing as he wished, as set forth above, there was ample other evidence from which the jury could have drawn a different conclusion. Specifically, Blount, Fouts, and Stroud's executive assistant each testified

that Stroud had a very bad temper and that there were racial tensions at Jovon. The record also revealed that Stroud disregarded these allegations of racism and sexism. Blount testified that Stroud threatened her on more than one occasion and that Stroud attempted to intimidate her with his wealth, power, and connections. Blount also presented adverse testimony from Roland Burris, the Tinley Park police chief, and other employees of Jovon which evidenced how Stroud attempted to use his connections to prevent Blount from testifying that she had witnessed racial and sexual harassment of Fouts. In making its credibility determinations, the jury also had the opportunity to observe Stroud's demeanor on the witness stand. The jury could have resolved these issues of credibility against Stroud and could have found his conduct to have been egregious enough to warrant punitive damages. Recognizing that the appellate court is not in the position to reassess the credibility of witnesses (*Franz*, 352 Ill. App. 3d at 1144), we will not second-guess the jury's credibility determinations here.

Regarding the amount of the damages, although $2.8 million is significantly more than the amount of compensatory damages awarded, under the Illinois common law analysis, there is no requirement that the amount of punitive damages imposed on a defendant bear any particular proportion to the size of the plaintiff's compensatory recovery. *Deal*, 127 Ill. 2d at 204. Once again, the jury heard evidence of not only the racially charged atmosphere at Jovon, but also of Stroud's attitude, his attempts to use his

power and connections to intimidate and threaten, and also his substantial wealth. In his trial testimony, Stroud admitted that he was a "millionaire" and that he donated $1.5 million to Roland Burris's 2002 gubernatorial campaign and "a couple of hundred thousand dollars" to President Clinton's efforts to relieve H.I.V. in Africa. The parties stipulated that Stroud's net worth was $87.5 million.

Juries have the unique ability to "articulate community values" and evaluate "the reprehensibility of a defendant's conduct for the purposes of awarding punitive damages." *Franz*, 352 Ill. App. 3d at 1144. The jury could have found the nature of Stroud's conduct to be egregious, and when factored against his substantial wealth, it could have determined that Stroud's conduct warranted $2.8 million dollars in punitive damages. This amount represents roughly 3% of Stroud's net worth, and we cannot say that this sum was the result of passion or prejudice on the part of the jury. *See, e.g., O'Neill v. Gallant Insurance Co.*, 329 Ill. App. 3d 1166, 1185 (2002) (upholding punitive damage award of 10% of the defendant's net worth for a breach of fiduciary duty); *Howard v. Zack Co.*, 264 Ill. App. 3d 1012, 1028 (1994) (upholding punitive damage award of 5% of defendant's net worth in retaliatory discharge action).

Defendants next claim that the jury's award of $2.8 million in punitive damages was so excessive that it violated their constitutional right to due

process. This analysis differs significantly from the Illinois common law analysis.

The due process clause of the fourteenth amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor because such awards serve no legitimate purpose and constitute an arbitrary deprivation of property. *State Farm Mutual Automobile Insurance Co. v. Campbell,* 538 U.S. 408, 417, 123 S. Ct. 1513, 1519-20, 155 L. Ed. 2d 585, 600 (2003). Punitive damage awards generally serve the same purposes of punishment and deterrence as criminal penalties; however, they are not subject to the protections applicable to a criminal proceeding. *Campbell,* 538 U.S. at 417, 123 S. Ct. at 1520, 155 L. Ed. 2d at 601. Instead, they are "imprecisely" determined by juries with wide discretion to choose amounts. *Campbell,* 538 U.S. at 417, 123 S. Ct. at 1520, 155 L. Ed. 2d at 601. Further, the United States Supreme Court has expressed "concern" that juries may be basing their awards on "'biases against big businesses, particularly those without strong local presences.' [Citation.]" *Campbell,* 538 U.S. at 417, 123 S. Ct. at 1520, 155 L. Ed. 2d at 601.

Accordingly, the Court developed the following three guideposts to determine whether an award of punitive damages by a jury comports with due process: (1) the degree of reprehensibility of the conduct; (2) the disparity between the harm or potential harm suffered by the plaintiff and the amount of punitive damages awarded; and (3) the difference between the punitive damages awarded

and the civil penalties authorized or imposed in comparable cases. *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 575, 116 S. Ct. 1589, 1598-99, 134 L. Ed. 2d 809, 826 (1996). We are to apply these factors using a *de novo* standard of review in order to ensure that the punitive damages award is based upon the "'application of law, rather than a decisionmaker's caprice'." *Cooper Industries,* 532 U.S. at 436, 121 S. Ct. at 1685, 149 L. Ed. 2d at 687, quoting *Gore,* 517 U.S. at 587, 116 S. Ct. at 1605, 134 L. Ed. 2d at 834 (Breyer, J., concurring).

The Court has explained that the first factor, the degree of reprehensibility of the defendant's conduct, is the most important. *Gore,* 517 U.S. at 575, 116 S. Ct. at 1599, 134 L. Ed. 2d at 826; *see also Campbell,* 538 U.S. at 419, 123 S. Ct. at 1521, 155 L. Ed. 2d at 602. In evaluating the reprehensibility of the defendant's conduct, the Court has instructed us to consider whether: (1) the harm caused was physical as opposed to economic; (2) the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of intentional malice, trickery, or deceit, or mere accident. *Campbell,* 538 U.S. at 419, 123 S. Ct. at 1521, 155 L. Ed. 2d at 602. The existence of only one of these factors weighing in the plaintiff's favor may not be sufficient to sustain a punitive damage award, and the existence of none of these factors in the plaintiff's favor would render the award suspect. *Campbell,*

538 U.S. at 419, 123 S. Ct. at 1521, 155 L. Ed. 2d at 602.

Here, all but one of these factors weigh in favor of the jury's verdict. Regarding the first subfactor, although the harm to Blount was primarily emotional and economic, she also suffered some physical manifestations of psychological harm, including anxiety attacks and an esophageal infection. Moreover, Stroud also threatened Blount, informing her that he could cause her to "cease to exist" and that she "didn't know who she was fucking with." Blount understood these comments to be threats of physical harm or threats on her life. Such threats of physical violence are regarded as more reprehensible than nonviolent conduct, and actual physical harm need not occur to establish reprehensibility. *Mendez-Matos v. Municipality of Guaynabo*, 557 F.3d 36, 53 (1st Cir. 2009). These threats make the harm in this case more reprehensible than a retaliation case involving strictly emotional and economic harm. See, *e.g.*, *Daka, Inc. v. McCrae*, 839 A.2d 682, 699-700 (D.C. App. 2003).

Regarding the third subfactor, Blount was a financially vulnerable single mother of two. Stroud knew this and sought to use her position as the sole provider for her children to persuade her to not support Fouts. Stroud told her that "Bonnie didn't pay your bills," that he did, and that she should do what he said so that she and her children did not "go over a cliff" financially. Courts have recognized single mothers such as Blount to be financially

vulnerable. See, *e.g., Watson v. E.S. Sutton, Inc.*, No. 02 Civ. 2739(KMW), slip op. at 17, 2005 WL 2170659 (S.D.N.Y. September 6, 2005).

Regarding the fourth subfactor, we may consider the defendant's conduct toward the plaintiff as well as the defendant's related conduct toward other parties. *International Union of Operating Engineers, Local 150 v. Lowe Excavating Co.*, 225 Ill. 2d 456, 480 (2006). Conduct is related if it is factually and legally similar. *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004). Here, Stroud's conduct was repeated toward Blount and Fouts. Stroud threatened Blount on multiple occasions and tried to influence her to not testify on behalf of Fouts numerous times. Further, not only did Stroud terminate Blount for her engagement in protected activity, he also terminated Fouts based on hers. Cathy Harden also testified that she was teased for being "white." Although this evidence does not necessarily rise to the level of being a "pattern" of misconduct against numerous individuals, it nevertheless weighs in favor of upholding the punitive damages award. *Cf. Williams*, 378 F.3d at 797-98 (factually similar instances of racism against the plaintiff and against numerous other employees established a pattern of misconduct).

Regarding the fifth and final subfactor, the evidence shows intentional malice on the part of Stroud. Stroud's conduct and statements show that he intended to not only threaten and intimidate Blount, but also to make her suffer. Specifically,

Stroud testified at trial that he wanted to have Blount criminally charged and to sue her civilly for eavesdropping to cause her to "suffer some of the consequences" of having to defend a lawsuit. Further, Stroud repeatedly threatened Blount. Stroud's actions in giving Blount the photograph of himself with President Clinton and in contacting Roland Burris also show that he intended to use his power and influence to induce Blount to do as he wanted without regard for what had actually happened to Fouts. See, *e.g., Lowe Excavating Co.*, 225 Ill. 2d at 482-83 (finding intentional malice where the defendant union picketed the plaintiff with signs that it knew were false in order to interfere with the plaintiff's business).

In conclusion, the evidence in the record shows that Stroud's conduct was significantly reprehensible. Stroud's threats and attempts to use his wealth and power to silence Blount compound the allegations of racism and sexism underlying the case and raise it to a level of conduct warranting a significant amount of punitive damages.

Regarding the second factor of the *Gore* analysis, we are to consider the ratio between the punitive damages awarded compared with the amount of "actual harm" sustained by the plaintiff. *Lowe Excavating Co.*, 225 Ill. 2d at 483. To that end, the Supreme Court has cautioned that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety," and that "few awards exceeding a single-digit ratio between punitive and compensatory

damages, to a significant degree, will satisfy due process." *Campbell,* 538 U.S. at 425, 123 S. Ct. at 1524, 155 L. Ed. 2d at 606. However, the Court has also made clear that the constitutional limit for the amount of punitive damages that may be awarded cannot be reduced to a "'simple mathematical formula'." *Lowe Excavating Co.*, 225 Ill. 2d at 484, quoting *Gore,* 517 U.S. at 582, 116 S. Ct. at 1602, 134 L. Ed. 2d at 830-31.

Here, the jury awarded Blount a total of $282,350 in compensatory damages, of which $25,000 was for Blount's physical and/or emotional pain and suffering and the balance was to compensate her for back pay.[4] When compared to the punitive damage award of $2.8 million, the ratio would be roughly 10 to 1. However, Blount was also awarded $1,182,832.10 in attorney fees and costs under section 1988 of the Civil Rights Act. 42 U.S.C. § 1988 (2000).

In Illinois, our supreme court has recognized that the amount of attorney fees expended in a case may be taken into account when assessing the propriety of a punitive damage award. *Lowe Excavating Co.*, 225 Ill. 2d at 490. A wealthy defendant can mount an extremely aggressive defense, and the prospect of

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[4] In their petition for rehearing, defendants assert, for the first time, that back pay is not compensatory and, therefore, should not be included in the compensatory side of the *Gore* compensatory-punitive damages ratio. As a result, defendants have forfeited the issue, and we will not consider it. 188 Ill. 2d R. 341(e); *Price v. Philip Morris, Inc.*, 219 Ill. 2d 182 (2005).

costly litigation can deter lawyers from representing plaintiffs in such cases. *Lowe Excavating Co.*, 225 Ill. 2d at 490, citing *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003). Therefore, the economic cost of the litigation is a relevant consideration to factor into the side of the ratio that quantifies the amount necessary to make the plaintiff whole. *See Lowe Excavating Co.*, 225 Ill. 2d at 490; *Kirkpatrick v. Strosberg*, 385 Ill. App. 3d 119, 136 (2008). We further note that the majority of the courts across the country that have considered this issue have agreed that an award of attorney fees should be taken into account as part of the compensatory damages factor in the *Gore* analysis. *See, e.g., Willow Inn, Inc. v. Public Service Mutual Insurance Co.*, 399 F.3d 224, 236-37 (3d Cir. 2005); *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634, 642 (10th Cir. 1996); *Walker v. Farmers Insurance Exchange*, 153 Cal. App. 4th 965, 973 n. 8 (2007); *Girdner v. Rose*, 213 S.W.3d 438, 449 (Tex. App. 2006); *but see Laymon v. Lobby House, Inc.*, 613 F. Supp. 2d 504, 505 (D. Del. 2009) (a Title VII case, holding that attorney fees should not be considered in the ratio because they are expressly excluded from compensatory damages under section 1981a(b)). Indeed, as the Tenth Circuit pointed out, nothing in *Gore* prohibits consideration of the costs incurred by the plaintiff in bringing the legal proceedings to vindicate rights as part of the "actual harm" suffered. *Continental Trend Resources*, 101 F.3d at 642.

In their petition for rehearing, defendants nevertheless contend that attorney fees should have been counted in the punitive side of the *Gore* compensatory-punitive damage ratio. They assert that this is because the purpose of attorney fees under section 1988 is to punish defendants for wrongful conduct. We disagree.

Contrary to defendants' assertions, section 1988 is "remedial" in nature; it is not punitive. *Williams v. City of Fairburn*, 702 F.2d 973, 976 (11th Cir. 1983). The purpose of section 1988 is to ensure effective access to the judicial process for persons with civil rights claims and to encourage litigation to enforce the provisions of the Civil Rights Act and the Constitution. *Hernandez v. Kalinowski*, 146 F.3d 196, 199 (3d Cir. 1998). In enacting section 1988, Congress recognized that attorney fees are the single largest cost of successful civil rights litigation. *Page v. Preisser*, 468 F. Supp. 399, 403 (S.D. Iowa 1979), citing S. Rep. No. 94-1011, at 3 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5908, 5912-13.

In *Willow Inn*, the United States Court of Appeals for the Third Circuit asked "what figure" to compare to the punitive damages awarded in the ratio and found statutory attorney fees and costs awarded under a Pennsylvania statute with similar goals should be included on the compensatory side of the *Gore* ratio. *Willow Inn*, 399 F.3d at 234, 237. The Pennsylvania statute in question, which addressed bad faith by insurers in dealing with insurance claims, also provided for awards of punitive damages against the insurer and separately provided for

assessment of costs and attorney fees against the insurer. *Willow Inn*, 399 F.3d at 229, quoting 42 Pa. Cons. St. at § 8371. The Third Circuit stated that although it was a "stretch" to say that the insurer "inflicted" the attorney fees and costs on the insured, the purpose of the fee-shifting provision was to ensure that plaintiffs could secure counsel. *Willow Inn*, 399 F.3d at 236. The court also found that the goal of the statute was to place the insured plaintiffs in the same economic position they would have occupied had the insurer performed as promised; thus, the attorney fees and costs were additional damages. *Willow Inn*, 399 F.3d at 237. The purpose of the separate award of punitive damages, in contrast, was to punish the insurer for giving primacy to its own self-interest over the interest of the insured. *Willow Inn*, 399 F.3d at 237. The fee shifting enabled plaintiffs to "enlist" counsel to perform the function of punishing insurers via the civil system, rather than the overloaded criminal system. *Willow Inn*, 399 F.3d at 236. Thus, the court factored the award of attorney fees and costs under the statute into the compensatory side of the *Gore* ratio and upheld the amount of punitive damages awarded in the case. *Willow Inn*, 399 F.3d at 237-238.

Here, as in *Willow Inn*, the purpose of the statutory attorney fees is to enable plaintiffs to obtain counsel to not only level the economic playing field but, also, to perform the function of a private "attorney general" to enforce fundamental constitutional rights via the civil system. *See Riddell*

v. National Democratic Party, 624 F.2d 539, 543 (5th Cir. 1980), citing S. Rep. No. 94-1011, at 3 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5908, 5910. Thus, as in *Willow Inn*, we find that the award of attorney fees under section 1988 should be counted on the compensatory side of the *Gore* ratio.

Nevertheless, defendants contend that our supreme court's rationale in *Lowe* was premised on the fact that the plaintiff was not able to recoup attorney fees pursuant to statute or otherwise. Defendants maintain that because the plaintiff could not be awarded attorney fees, the supreme court allowed a higher amount of punitive damages to compensate. Our review of *Lowe* reveals that the supreme court articulated no such rationale. Moreover, the Second District in the subsequent case of *Kirkpatrick* found no distinction to be made between cases in which fees could be awarded pursuant to statute or contract and cases in which fees could not be awarded. *See Kirkpatrick*, 385 Ill. App. 3d at 136. In that case, $300,000 in punitive damages were awarded, no compensatory damages were awarded, and attorney fees were awarded under the Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 *et seq.* (West 1996)), a statute very similar in nature to the Pennsylvania bad-faith statute at issue in *Willow Inn*. *Kirkpatrick*, 385 Ill. App. 3d at 123, 136. Following *Lowe*, the court found that attorney fees should be included in the compensatory side of the *Gore* ratio, as in *Willow Inn*, and upheld the award of punitive damages with a ratio of just over 3.5 to 1. *Kirkpatrick*, 385 Ill. App.

3d at 136. Defendants have articulated no reason for us to depart from this rationale.

We therefore take the attorney fee award into account as part of the "actual harm" suffered by Blount. Adding the amount of the fee award to Blount's compensatory damages, the ratio is less than 2 to 1-1.8 to 1 to be exact. This is well within the permissible guideline. *See, e.g., Kirkpatrick*, 385 Ill. App. 3d at 136 (taking attorney fees into account where no compensatory damages were awarded and finding a ratio of 3.5 to 1 permissible).

The final *Gore* factor is "the disparity between the punitive damages award and the 'civil penalties authorized or imposed in comparable cases'." *Campbell*, 538 U.S. at 428, 123 S. Ct. at 1526, 155 L. Ed. 2d at 607-08, quoting *Gore*, 517 U.S. at 575, 116 S. Ct. at 1598-99, 134 L. Ed. 2d at 826. On this factor, the parties analogize to criminal fines and penalties for assault and suborning perjury. Although the Supreme Court in the past directed us to consider criminal penalties, the Court has since recognized that analogy to criminal penalties has little utility when used to determine dollar amounts. *Campbell*, 538 U.S. at 428, 123 S. Ct. at 1526, 155 L. Ed. 2d at 607-08. We will therefore not consider criminal penalties. The parties do not discuss comparable civil sanctions in their briefs. They obviously failed to recognize that *Gore* also requires consideration of comparable civil penalties. *Campbell*, 538 U.S. at 428, 123 S. Ct. at 1526, 155 L. Ed. 2d at 607-08, quoting *Gore*, 517 U.S. at 575, 116 S. Ct. at 1598-99, 134 L. Ed. 2d at 826.

The closest analog to a section 1981 retaliation claim would be a retaliation claim under Title VII. *See Williams*, 378 F.3d at 798 (analogizing a section 1981 harassment claim to a Title VII harassment claim in assessing the third *Gore* factor). The amount of damages available under Title VII is capped based on the number of employees employed by the defendant, and the highest amount available is $300,000.[5] 42 U.S.C. § 1981a(b) (2000); *see also Williams*, 378 F.3d at 798. The Illinois Human Rights Act also provides a civil means of redress for retaliation. 775 ILCS 5/6-101(A) (West 2006). However, under the Illinois Human Rights Act as it existed at the time Blount filed her complaint, punitive damages were not available. *See, e.g., Cummings v. Iron Hustler Corp.*, 118 Ill. App. 3d 327, 333 (1983). The fact that these other means of redressing retaliation authorize substantially lower amounts of damages seems to mitigate against the amount of Blount's punitive damages. However, the federal courts have repeatedly recognized that the fact that section 1981 does not contain such limits should not weigh against the damage award unless there is a "huge discrepancy." *See, e.g., Williams*, 378 F.3d at 798; *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020, 1045 (9th Cir. 2003). For instance, in Williams, the court found a $6 million punitive damage award where only $300,000 would be authorized under Title VII to warrant remittitur. *Williams*, 378 F.3d at 798-99. There is not such a

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[5] The record does not indicate how many individuals are employed by Jovon.

"huge discrepancy" here. The amount of punitive damages awarded was roughly $2.8 million, which is less than half of what the court found to be invalid in *Williams*. *Williams*, 378 F.3d at 798-99; *see also Zhang*, 339 F.3d at 1045 (finding a $2.6 million award to not be a "huge discrepancy" from the $300,000 limit).

Further, we must also consider the amount of damages imposed in similar cases. *Campbell*, 538 U.S. at 428, 123 S. Ct. at 1526, 155 L. Ed. 2d at 607-08, quoting *Gore*, 517 U.S. at 575, 116 S. Ct. at 1598-99, 134 L. Ed. 2d at 826. Penalties in the neighborhood of the amount awarded to Blount here have been upheld for similar 1981 claims. *See, e.g.*, *Zhang*, 339 F.3d at 1045 (upholding a $2.6 million punitive damage award in a section 1981 action alleging that the plaintiff had been harassed and terminated based on his ethnicity). For these reasons, we find that the amount of punitive damages awarded to Blount here comports with due process.

Defendants also suggest that the jury was improperly instructed on punitive damages. Specifically, they argue that the nonpattern instruction they tendered should have been given instead of the pattern instruction. However, the record discloses that defendants withdrew the instruction they offered. Therefore, they have forfeited any objection to the use of the pattern instruction. See *Lawler v. MacDuff*, 335 Ill. App. 3d 144, 149 (2002).

Defendants' final overarching contention on appeal is that the trial court erred in denying their motion for a new trial where five separate evidentiary errors committed during the trial unfairly prejudiced them and tainted the jury's verdict. We will address each claim separately.

We review a trial court's decision regarding the admissibility of evidence for abuse of discretion. *Aguirre v. City of Chicago*, 382 Ill. App. 3d 89, 98 (2008). An abuse of discretion occurs only when no reasonable person would rule as the trial court did. *Aguirre*, 382 Ill. App. 3d at 986.

Defendants first contend that the trial court abused its discretion in permitting Blount to present evidence regarding Stroud's "assertion of his legal rights" to pursue Blount criminally and civilly for eavesdropping. Defendants claim that the admission of this evidence violated their first amendment rights to petition the government for redress and the *Noerr-Pennington* doctrine. *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961).

In their briefs, defendants point to three particular instances where testimony adduced at trial violated the *Noerr-Pennington* doctrine and their first amendment rights. First, they point to evidence regarding defendant Stroud's civil eavesdropping suit and the temporary restraining order he sought. Defendants claim Blount

improperly introduced this evidence. However, contrary to defendants' assertions, our review of the record shows that this evidence was actually presented by defendants pursuant to a stipulation between the parties. Pursuant to that stipulation, defendants' counsel read to the jury a statement that, "Mr. Stroud filed a lawsuit against Ms. Blount in the Circuit Court of Cook County, seeking to prevent further taping and any use of the recording[s] that have been made." Defendants' counsel further informed the jury that although a temporary restraining order was entered, the judge never ruled on whether the evidence was actually an eavesdropping violation. Thus, defendants cannot now complain about the admission of evidence to which they not only stipulated, but presented to the jury. Therefore, we will not consider their arguments regarding the admission of evidence regarding the civil eavesdropping suit.

Second, defendants point to a statement made by Stroud during his examination by his own counsel in which he stated that the judge who presided over his civil eavesdropping suit told him that he should contact the authorities to bring a criminal claim. Stroud stated that the judge told him that if, in fact, Blount's claim that her life was in jeopardy were true, then it would have been legal for her to tape him. Stroud continued to state that the judge found that Blount's life had not been threatened, and entered a temporary restraining order barring dissemination of the recorded material. However, contrary to defendants' assertions, once again, this

testimony was elicited by defendants' counsel. Therefore, they cannot now complain about its admission into evidence.

Third and finally, defendants take issue with Blount's presentation of testimony from Officer Michael O'Connell of the Tinley Park police department. Officer O'Connell testified that Stroud and several other individuals from Jovon filed criminal complaints alleging eavesdropping with his office. Officer O'Connell investigated the matter, prepared a report, and turned the information over to the State's Attorney to determine whether to file criminal charges. He explained that it was the State's Attorney's decision whether or not to pursue charges, and in this instance, the State's Attorney decided not to pursue charges. Defendants objected to this testimony on, *inter alia,* the grounds that it violated the *Noerr-Pennington* doctrine, and the court overruled the objection. Defendants also raised the issue in their posttrial motion. Therefore, we will consider whether the circuit court abused its discretion in allowing the testimony.

Among other rights, the first amendment confers the right to petition the government for redress of grievances through the courts, by lobbying government, and by other means. *Bill Johnson's Restaurants, Inc. v. National Labor Relations Board,* 461 U.S. 731, 741, 103 S. Ct. 2161, 2169, 76 L. Ed. 2d 277, 288 (1983); *King v. Levin,* 184 Ill. App. 3d 557, 559 (1989). The *Noerr-Pennington* doctrine, in essence, provides that parties who petition the government for action favorable to their position

cannot be sued under the Sherman Act (15 U.S.C. § 1 *et seq.* (2000)) even though their actions are motivated by anticompetitive intent. *Stahelin v. Forest Preserve District,* 376 Ill. App. 3d 765, 776 (2007). However, that petitioning must be subjectively and objectively genuine. *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.,* 508 U.S. 49, 60-61, 113 S. Ct. 1920, 1928, 123 L. Ed. 2d 611, 624 (1993).

The *Noerr-Pennington* doctrine has been applied to some state-law tort claims outside the antitrust area, such as tortious interference with prospective economic advantage. *King,* 184 Ill. App. 3d at 560. However, there is a significant amount of case law across the country discussing the applicability of the doctrine to various state-law tort claims. *Myers v. Levy,* 348 Ill. App. 3d 906, 918 (2004); *see also* A. Wooster, *Annot., Application of Noerr-Pennington Doctrine by State Courts,* 94 A.L.R.5th 455, 469-70 (2001). Notably, the United States Supreme Court has never applied the doctrine in a case that did not involve the Sherman Act, the National Labor Relations Act, or business and economic interest disputes between competitors. *See, e.g., BE & K Construction Co. v. National Labor Relations Board,* 536 U.S. 516, 525, 122 S. Ct. 2390, 2396, 153 L. Ed. 2d 499, 511 (2002) (explaining that "These antitrust immunity principles were then extended to situations where groups 'use ... *courts* to advocate their causes and points of view respecting resolution of their business and economic interests *vis-à-vis* their competitors' " (emphasis in original)), quoting

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 511, 92 S. Ct. 609, 612, 30 L. Ed. 2d 642, 646 (1972).

Indeed, the United States Supreme Court declined to allow the doctrine to be used as a defense to defamation, holding that the first amendment's right to petition does not insulate individuals from liability for maliciously publishing falsehoods about another. *McDonald v. Smith,* 472 U.S. 479, 485, 105 S. Ct. 2787, 2791, 86 L. Ed. 2d 384, 390 (1985). The Court specifically stated, "The right to petition is guaranteed; the right to commit libel with impunity is not." *McDonald,* 472 U.S. at 485, 105 S. Ct. at 2791, 86 L. Ed. 2d at 390. In so holding, the Court noted that in a defamation claim, the defendant's intent to harm is relevant. *See McDonald,* 472 U.S. at 484, 105 S. Ct. at 2791, 86 L. Ed. 2d at 389-90. Illinois courts have followed that holding and concluded that the first amendment right to petition and the *Noerr-Pennington* doctrine do not provide a defendant with additional protection from liability for defamation. *Myers,* 348 Ill. App. 3d at 919.

Here, defendants have failed to cite any cases permitting the *Noerr-Pennington* doctrine to be used as a defense to a retaliation claim, and this court has similarly failed to find any such cases. Defendants have also failed to discuss whether the doctrine should be extended to apply in the circumstances present in this case.

We decline to extend the applicability of the *Noerr-Pennington* doctrine to provide immunity from

retaliation claims. Retaliation claims, whether under section 1981 or state common law, have more in common with defamation and privacy torts than with the Sherman Act or the National Labor Relations Act. As with defamation claims, the defendant's intent is highly relevant to the claim. The court must examine the defendant employer's rationale for terminating or adversely treating the plaintiff employee. *See, e.g., Buckner v. Atlantic Plant Maintenance, Inc.*, 182 Ill. 2d 12, 19 (1998) (discussing the parameters of the tort of retaliatory discharge and emphasizing that an employer cannot discharge an employee where the discharge violates public policy). Put another way, an employer does not have a right to retaliate against an employee, and the petition clause should not cloak an employer with immunity to do so. *See McDonald*, 472 U.S. at 485, 105 S. Ct. at 2791, 86 L. Ed. 2d at 390. We therefore decline to extend the *Noerr-Pennington* doctrine to the present circumstances.

However, even if it could be said that the doctrine might apply to retaliation claims, we could not find that it would apply in this case. The *Noerr-Pennington* doctrine is usually raised as a defense where one party seeks to enjoin another from bringing a suit. *See, e.g., BE & K Construction*, 536 U.S. at 530, 122 S. Ct. at 2398, 153 L. Ed. 2d at 514. Thus, when the party to be enjoined has had his day in court, those concerns are no longer present. *Bill Johnson's Restaurants*, 461 U.S. at 747, 103 S. Ct. at 2172, 76 L. Ed. 2d at 292. However, the doctrine may also be applied where a party contends that

another party's completed lawsuit is unlawful. *BE & K Construction*, 536 U.S. at 527, 122 S. Ct. at 2397, 153 L. Ed. 2d at 512.

Here, Blount did not attempt to thwart defendants' right to seek redress in the court system or through the criminal justice system. Indeed, defendants have already had their "day in court" on their civil eavesdropping claim against Blount, and the State's Attorney decided that there were no grounds to charge Blount criminally. Further, Blount does not claim that Stroud's actions in petitioning were unlawful. Instead, Blount used evidence of Stroud's statements and actions regarding the eavesdropping claim as circumstantial evidence of Stroud's state of mind, specifically, his retaliatory animus.

In determining whether the *Noerr-Pennington* doctrine is applicable to these circumstances, we find our prior decision in *Myers* to be instructive. In *Myers*, the court found that the plaintiff's amended complaint was not directed toward the defendant's attempt to influence government decision making. *Myers*, 348 Ill. App. 3d at 918-19. Therefore, the court found that the *Noerr-Pennington* doctrine was inapplicable and that defamation principles should govern the determination of whether the plaintiff could proceed with his claim in that case. *Myers*, 348 Ill. App. 3d at 919.

Here, as in *Myers*, Blount's amended complaint was not directed at Stroud's attempts to have her charged criminally. Rather, Blount's complaint

specifically alleged that Stroud's repeated attempts to have criminal charges filed against her for eavesdropping were "further evidence of his retaliatory animus." Blount did not claim that Stroud's actions were unlawful, nor did she challenge those actions. Thus, because Blount has never sought to either thwart defendants' right to petition or claim that their actions in so doing were unlawful, the *Noerr-Pennington* doctrine is inapplicable here. *See, e.g., Myers,* 348 Ill. App. 3d at 919. Accordingly, we cannot say that the trial court abused its discretion in allowing Officer O'Connell's testimony.

The second evidentiary error cited by defendants is that the trial court abused its discretion in allowing courtroom testimony from the eavesdropping action to be used for impeachment. Specifically, defendants assert that "Judge Goldberg allowed Ms. Blount-the eavesdropper-to use the illegally obtained statements during her attempted impeachment of Mr. Stroud and during her closing argument to the jury." Defendants further assert that "Blount's counsel was permitted to repeat statements made by Mr. Stroud on the illegal tapes in front of the jury." Defendants claim that this was a violation of Article 14 of the Illinois Criminal Code of 1963 (720 ILCS 5/14-1 *et seq.* (West 2000)), which pertains to eavesdropping. However, in neither their brief nor petition for rehearing did defendant point to any specific evidence that was admitted at this trial that was part of the illegally recorded material, nor do defendants cite to any portions of the record to

indicate when this evidence was improperly admitted.

The article 14 of the Criminal Code generally prohibits the surreptitious recording of conversations. 720 ILCS 5/14-2 (West 2000). Section 14-5 specifically prohibits evidence obtained in violation of the eavesdropping statute from being used in any criminal or civil proceeding. 720 ILCS 5/14-5 (West 2000). However, contrary to defendants' assertions, Blount never introduced or sought to introduce the surreptitiously recorded conversations into evidence. Rather, she used testimony adduced in the civil eavesdropping action in the present trial to impeach the testimony of Stroud and others regarding their efforts to induce her not to testify on behalf of Fouts. Our review of the record reveals that this testimony did not disseminate the contents of the illegal recordings. Indeed, the reason that defendants fail to include any citations to the record where these statements were admitted is because these statements were never admitted. Although section 14 5 prohibits the use of surreptitiously recorded material from being used, it in no way prohibits the use of courtroom testimony from a civil eavesdropping action which did not contain the surreptitiously recorded statements-from being used for impeachment in a later proceeding. See 720 ILCS 5/14-5 (West 2000); see also *People v. Seehausen*, 193 Ill. App. 3d 754, 761 (1990) (holding that sworn statements independent from surreptitiously recorded material were not prohibited by section 14-5). Therefore, we

cannot say that the trial court abused its discretion when it permitted Blount to use testimony from the eavesdropping suit for impeachment.[6]

Third, defendants contend that the trial court abused its discretion in admitting the videotaped depositions of Wallace Ray Davis and Robert Klenk, the president and sales manager, respectively, of the firm that hired Blount after her termination from Jovon. In those depositions, Davis and Klenk related that shortly after they hired Blount, Shawn Hill from WJYS telephoned them and told them that Jovon had "filed criminal charges" against Blount and that she had "pulled some real Shenanigans" while she was employed there. Davis also testified that he later determined that Blount was a "model"

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[6] Section 14-3 also contains an exemption for recordings made by private individuals who are a party to a conversation and under reasonable suspicion that another party to the conversation is committing, is about to commit, or has committed a criminal offense against that individual or a member of his immediate household. 720 ILCS 5/14-3(i) (West 2000). Here, where Blount believed that Stroud was threatening her life, she would arguably come within that exception. Compare *In re Marriage of Jawad*, 326 Ill. App. 3d 141, 144 (2001) (trial court admitted surreptitious recording of statement by husband threatening that wife would "not see" their daughter "at age 11" under this exemption), with *People v. Nestrock*, 316 Ill. App. 3d 1, 9 (2000) (finding that a recording made for the purpose of assisting with investigating a crime, but where there was no threat of harm to the parties who made the recording, did not come within the exemption). Indeed, as set forth in our discussion of the facts adduced at trial, the Cook County State's Attorney determined that there were no grounds to prosecute Blount criminally.

employee and that he had an unfavorable impression of the way Jovon conducted its business. Defendants claim that this testimony was prejudicial, irrelevant, and improperly bolstered Blount's testimony.[7]

Defendants fail to recall that Blount also raised a defamation claim in her complaint, which was based on these specific allegations. This testimony was therefore relevant to those claims, and the court found as much when it ruled on defendants' motion to bar the use of that testimony at trial. The court further found that the truth or falsity of the testimony was an issue of fact for the jury to decide. Thus, we cannot say that the trial court abused its discretion in admitting the testimony. *Cf. Popko v. Continental Casualty Co.*, 355 Ill. App. 3d 257, 266 (2005) (finding evidence of an employee's status as an "at-will" employee was not relevant to whether he had been terminated as a result of defamatory remarks).

Defendants' fourth evidentiary claim is that the trial court abused its discretion in admitting hearsay statements of Cathy Harden, Stroud's secretary, and Fouts. Defendants challenge two specific aspects of their testimony. First, defendants point to testimony by Harden that when Blount exited the meeting of African-American managers held to discuss Fouts's

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[7] In response, Blount contends that this issue cannot be reviewed because the depositions are not in the record. However, our examination of the record has revealed that these items were contained in the record. Therefore, we may review the issue.

EEOC charge, she was crying and saying that Stroud wanted her to perjure herself and did not want her "siding" with Fouts. Second, defendants point to Fouts's testimony regarding the epithets that Howell called her, such as "the white bitch."

The admission of these two categories of statements does not entitle defendants to a new trial. Regarding at least the second category of statements, which were those related by Fouts, we cannot say that these statements were hearsay because they were not offered for the truth of the matter asserted. *See, e.g., Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 99 (1995) (explaining that the statement of witness A testifying that "'B told me that event X occurred' " would be inadmissible if offered to prove that event X occurred but would be admissible if offered to prove that B said event X occurred).

Regarding both categories of statements, even if we could conclude that they were hearsay and improperly admitted, the law is clear that the erroneous admission of hearsay is not grounds for reversal where there was sufficient competent evidence to support the decision. *Cochrane's of Champaign, Inc. v. State Liquor Control Comm'n*, 285 Ill. App. 3d 28, 32 (1996), citing *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 94 (1992). Here, apart from Harden's and Fouts's testimony, there was substantial other testimony to establish that Stroud retaliated against Blount for her engaging in protected activity, including not only testimony from Blount, but also

adverse testimony from Stroud, Roland Burris, and others. Further, defendants do not contest the sufficiency of the evidence to support Blount's retaliation claim. Therefore, there is no basis for disturbing the jury's verdict. *See, e.g., Anderson v. Alberto-Culver USA, Inc.*, 337 Ill. App. 3d 643, 668 (2003) (holding that although a report prepared by the National Transportation Safety Board had been improperly admitted into evidence, the error was harmless where there was ample other evidence in the record to support the jury's verdict as to who was flying an airplane at the time of a crash).

Defendants' last claim of evidentiary error is that the trial court abused its discretion in admitting two trial exhibits, numbers 20 and 52, which reflected sales credits of Jovon employees. However, as Blount correctly points out, these items are not contained in the record on appeal. Where, as here, the appellant has failed to present a sufficient record for review of an issue, we will presume that the trial court's decision on that issue was in conformity with the law and had a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984); *Cannon v. William Chevrolet/Geo, Inc.*, 341 Ill. App. 3d 674, 681 (2003).

For these reasons, we affirm the judgment entered by the circuit court of Cook County.

Affirmed.

APPENDIX B

[*Original opinion of the Appellate Court on remand, subsequently amended and superseded by the opinion reproduced in Appendix A*]

Appellate Court of Illinois,
First District, Third Division.

June 24, 2009

Nos. 1-06-2428 and 1-06-2968 Consolidated

JERRI BLOUNT,	)	Appeal from
	)	the Circuit
Plaintiff-Appellee,	)	Court of
	)	Cook County
v.	)	
	)	No. 01 L 2330
JOSEPH STROUD, an	)	
Individual, and JOVON	)	Honorable
BROADCASTING, WJYS-TV	)	Allen Goldberg,
62/34, an Illinois Corporation,	)	Judge Presiding.
Defendants-Appellants.	)	

JUSTICE THEIS delivered the opinion of the court:

Following a jury trial, defendants Jovon Broadcasting and Joseph Stroud, the owner and operational manager of Jovon Broadcasting, were found liable for retaliation against plaintiff Jerri Blount, a former employee of Jovon Broadcasting. The jury awarded Blount a total of $3,082,350 in

damages, which was comprised of $257,350 for back pay, $25,000 for physical and/or emotional pain and suffering, and $2,800,000 in punitive damages. The court also awarded Blount $1,182,832.10 in attorney fees and costs. On appeal, defendants contend that: (1) the trial court erred in denying their motion for judgment notwithstanding the verdict because Blount's retaliation claim was preempted by the Illinois Human Rights Act (775 ILCS 5/1-101 *et seq.* (West 2006)); (2) the trial court erred in denying their motion for judgment notwithstanding the verdict because Blount's retaliation claim was not cognizable under section 1981 of the United States Civil Rights Act of 1991 (42 U.S.C. §1981 (2000)); (3) the trial court erred in awarding Blount attorney fees; (4) the trial court erred in submitting Blount's request for punitive damages to the jury; (5) the jury's award of $2,800,000 in punitive damages is excessive; and (6) the trial court erred in denying defendants' motion for a new trial where certain evidentiary errors committed during the trial unfairly prejudiced defendants and tainted the jury's verdict.

In 2007, we found that the circuit court lacked the subject matter jurisdiction to entertain Blount's retaliation claim under section 8-111(C) of the Human Rights Act (775 ILCS 5/8-111(C) (West 2006)) and reversed the jury's verdict without addressing the remaining issues raised by defendants. *Blount v. Stroud*, 376 Ill. App. 3d 935 (2007). The supreme court then reversed our decision, finding that the Human Rights Act did not

present a jurisdictional bar to Blount's retaliation claim, whether it was a common law claim or a claim under section 1981 of the United States Civil Rights Act of 1991 (42 U.S.C. §1981 (2000)), because the Human Rights Act only addressed claims articulated expressly pursuant to that scheme. *Blount v. Stroud*, 232 Ill. 2d 302, 317-18 (2009). The supreme court accordingly remanded this cause to us to address defendants' remaining contentions. For the reasons that follow, we now affirm the judgment entered by the circuit court.

The record discloses the following facts and procedural history relevant to this appeal. In her complaint, as amended, Blount alleged the following. Blount, an African-American woman, was employed by Jovon Broadcasting, a Chicago-area television station, from 1993 until she was terminated in October 2000. At the time of her termination, Blount was the local programming time sales manager. Stroud, who is African-American, owned Jovon and managed all of its operations. Bonnie Fouts, a Caucasian-American woman discharged from employment at Jovon in 2000, filed a charge of discrimination with the United States Equal Employment Opportunity Commission (the EEOC), in which she claimed that she had been the victim of racial and sexual harassment. After being given the right to sue by the EEOC, Fouts filed a civil rights lawsuit in the United States District Court against Stroud and Jovon. Blount witnessed the racial discrimination and sexual harassment of Fouts and

agreed to testify on Fouts' behalf.[1] Blount claimed that she was discharged from Jovon on October 19, 2000, in retaliation for the fact that she had agreed to testify on behalf of Fouts.

Blount claimed that this retaliation was actionable under both the common law tort of retaliatory discharge and section 1981 of the Civil Rights Act of 1991 (42 U.S.C. §1981 (2000)). Specifically, regarding the Civil Rights Act claim, Blount alleged that defendants harassed her, intimidated her, and terminated her employment because she agreed to "support" Fouts and to testify on her behalf in her race and sex discrimination suit. Blount alleged that these actions of defendants interfered with her "at will employment contract," and were a violation of section 1981. In her common law claim, Blount alleged that Jovon wrongfully terminated her in violation of Illinois public policy because she refused to perjure herself to protect defendants in the Fouts matter. Blount also asserted claims for defamation and intentional infliction of emotional distress against both defendants.

The circuit court ultimately conducted a jury trial of Blount's claims of retaliation, defamation, and intentional infliction of emotional distress. Because defendants do not contest the sufficiency of the evidence to support the jury's verdict in this appeal,

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[1] Fouts ultimately settled her case against defendants.

we will merely present the evidence relevant to the issues raised.[2]

Stroud testified as an adverse witness that he and his wife, Yvonne, are the sole shareholders of Jovon, which is a small television broadcasting corporation. Jovon operates WJYS, Channel 62, in the Chicago area. WJYS broadcasts primarily religious programs, infomercials, and other advertisements. WJYS also broadcasts "community-based programs" and "local ministry programs." Stroud insisted that Jovon is a diverse workplace that is not operated on a racial basis.

However, Cathy Harden, Stroud's executive assistant, testified that there were discussions at the firm about the need to "hire more whites." Harden also described Stroud as having a bad temper. Harden, who was Caucasian, was also teased about being "white" and having "made it through" more than a week at Jovon.

Blount testified that Stroud hired her in 1993 to work as a program screener. After several years, Stroud promoted Blount to the sales department. There, Blount was responsible for selling air time to infomercial broadcasters. In addition to her salary, Blount was paid a commission on accounts she brought to the station which was based on how much air time she sold them. In May 2000, Stroud made Blount his local sales manager, which meant that at

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[2] Additional facts will be set forth below as relevant to the evidentiary issues raised by defendants.

least four other sales representatives reported to her. At that time, Blount was Jovon's "best" salesperson, generating approximately $2 to $3 million in revenue for WJYS annually. As a result, Blount, who was a single mother of two, was earning roughly $250,000 a year.

Bonnie Fouts testified that she began working at WJYS in March of 1999. She began in the traffic department, which monitored broadcasts to make sure that the correct programming was being aired at the correct times. In January 2000, Rick Howell, who was the only other employee in the traffic department at the time, began to act in a "hostile" manner toward Fouts. He made inappropriate comments to her, calling her racial and sexual epithets such as "white girl" and "white bitch." When Fouts asked Howell to stop addressing her in that manner, Howell told her that he was her manager and that he could speak to her in any way he wished.

Fouts informed Stroud of Howell's behavior in the spring of 2000. Stroud initially offered Fouts money for her "pain and suffering and anguish." Fouts told Stroud that she did not want money; she wanted the harassment to stop. However, it did not. Fouts repeatedly spoke with Stroud, whom she characterized as a "very angry man with a bad temper," and asked him to intercede, but he did nothing. In April of 2000, Stroud moved Fouts to another department at Jovon, but the harassment did not stop. Fouts had several more discussions with Stroud about Howell's behavior. Fouts also began sending Stroud letters requesting that he do

something about Howell's treatment of her, which Stroud admitted that he received. However, Stroud never discharged or disciplined Howell.

Stroud terminated Fouts's employment on August 24, 2000. Fouts felt that she was fired from a job that she "really liked" because she was being racially and sexually harassed and she reported that harassment. Fouts subsequently filed a charge of race and sex discrimination with the EEOC.

Stroud testified that on October 13, 2000, he received notice of Fouts' EEOC charge. Although Stroud believed that the charge was merely "legalese," he called a meeting of managers the same day. Only African-American managers attended the meeting. At that meeting, Blount indicated that she would be "supporting" Fouts in her charge of racial and sexual discrimination because she had witnessed Howell refer to Fouts numerous times as a "white bitch." Stroud admitted that he responded to Blount by stating that he did not understand "how a black person could side with a white person against a black person." Stroud also admitted that he stated that Fouts had placed the jobs of everyone at Jovon at risk by filing the EEOC charge. Stroud further stated that there was no place for independent opinions at his company.

Rick Howell testified that the charges levied by Fouts were "fictitious." He denied referring to Fouts as the "white bitch" and denied that Stroud said anything about a "black person siding with a white person" at the meeting. Howell maintained that

Fouts was treated well by everyone at Jovon, but she "played the race card."

Blount and Stroud testified that several days after the meeting, they went for a walk together to discuss Blount's involvement in the Fouts matter. Stroud testified that during this conversation, he never told Blount to lie about what happened with Fouts. Blount testified that Stroud asked her what she was "going to say in regards to Bonnie [Fouts]," and she responded that she would not lie. Stroud responded that he did not "get it," and called her an "ignorant nigger." Stroud also told her that she should not "side with" Fouts because "white people" have "done nothing for her," and because she should do what he told her to do.

Stroud then gave Blount a photograph of himself with President Clinton. Stroud had signed the photograph and told her that it could be her "key" to getting work at any television station she wanted because she knew the man who was "sitting there with the president" in the photograph. Stroud also told her that the photograph would make "a powerful statement." Stroud denied giving Blount this photograph, but later admitted doing so once he was shown that he had signed it and addressed it to her. Stroud explained that the picture was taken while he was on a trip to Africa with President Clinton, based on which Stroud donated several hundred thousand dollars for H.I.V. relief. Stroud added that he had been invited on the trip by Rev. Jesse Jackson. Stroud described President Clinton as a friend and stated that he was on the board of trustees of the Bill

Clinton Presidential Library. Stroud gave Blount the photograph because he was proud of it and because he wanted to make Blount proud; he denied giving it to her to show that he had "friends in high places."

Blount then admonished Stroud for having witnessed the harassment of Fouts and having done nothing. Blount testified that this made Stroud "irate." According to Blount, Stroud then started screaming at her and told her that she needed to know who she was "up against," asserting that he was "one of the richest niggers in the world," and that she did not know who she was "fucking with." Stroud also stated that he could cause her "to cease to exist."

On another occasion shortly thereafter, they began to discuss the Fouts matter again, and Stroud became "belligerent and crazed." He told her again that he could cause her "not to exist." Blount became frightened of Stroud based on these comments, which she perceived as threats. Although Stroud would often yell and scream at her, Stroud had never threatened her like this before. Blount then began to suffer "severe anxiety attacks," from which she developed an infected esophagus.

However, in his testimony, Stroud denied threatening Blount. Rather, Stroud believed that the actions by Fouts and Blount were a conspiracy to extort money from the station. Stroud explained that he had done "so much" for Blount by hiring her and training her to be a successful salesperson that

he felt Blount "betrayed" him, which made him "very angry." Stroud also believed that Blount's attorney had "put her up" to taking this position against him. Stroud described the whole situation as a "conspiracy" by Blount, Fouts, and their attorneys. Stroud added that if the Federal Communications Commission learned that WJYS discriminated on the basis of race, it could lose its broadcasting license. Stroud also admitted that he knew it was illegal to fire someone in retaliation for testifying.

Six days after receiving Fouts' charge, Stroud suspended Blount's employment. Stroud explained that he made this decision because Rick Howell, who was also his nephew, told him that Blount went around Jovon telling people that the station was "hers." Stroud also said that Ted France, another sales person, advised him that Blount had directed business to a competitor.

However, Stroud admitted that he did not have proof that Blount diverted business. Stroud also believed that Blount did not have respect for him and that she was not organized. Shortly after he suspended Blount, Stroud terminated her employment. Blount never returned to work after her suspension, and Stroud never paid her any further wages. Stroud terminated her employment on November 20, 2000. Blount commenced the present action on February 23, 2001.

Several months after her termination from Jovon, Blount was hired by Affiliated Media. During her first three years there, she earned between roughly

$57,000 and $90,000, which was less than half what she was earning at Jovon.

Nevertheless, at least a year after Blount filed this action, Stroud offered Blount the opportunity to return to work for him as an independent contractor. Blount testified that Stroud also asked her to "forget about the lawsuit," meaning the present suit, and told her that she should come back to work for him because he "didn't want to see [her] and [her] boys fall over a cliff." Stroud also told Blount that he had paid her "so much money" and that "Bonnie didn't pay your bills" and "get you on the other side of Harlem." Stroud gave her a check for $10,000, which Stroud testified was for "future services." Blount admitted that she cashed the check, but explained that she did so because she believed she was owed the money for sales commissions that she had not been paid prior to her termination. Blount did not return to work for Jovon.

Sometime in the latter half of 2001, after the present suit was filed, Stroud learned that Blount had been surreptitiously recording their conversations since as early as September 2000. Blount testified that she had done so because she wanted proof that Stroud had told her to perjure herself and had threatened that she would "cease to exist" if she did not.

In September 2001, Stroud sued Blount civilly for eavesdropping. Stroud testified that he did so because he wanted to "let her suffer some of the consequences that I am suffering," and because

"there would be consequences for her," which may cause her to withdraw her retaliation lawsuit. Although the circuit court judge presiding over the civil eavesdropping case entered a temporary restraining order enjoining Blount from divulging the tape recordings, Blount was never found liable for eavesdropping.[3]

Stroud nevertheless believed that Blount's actions were criminal and also pursued the filing of criminal charges against Blount. Officer Michael O'Connell of the Tinley Park police department testified that Stroud and several other individuals from Jovon filed criminal complaints alleging eavesdropping. However, Officer O'Connell explained that it was the role of the Cook County State's Attorney to determine whether or not to file criminal charges against Blount, and ultimately, the State's Attorney decided not to pursue charges against Blount.

Stroud also retained former Illinois Attorney General Roland Burris in 2002 for "legal consulting services" regarding the matter. Stroud admitted that he had previously donated $1.5 million to Burris's 2002 campaign for governor. Stroud also stated that he paid Burris $10,000 for his consulting services in how criminal charges could be filed against Blount. Stroud further stated that an additional $10,000

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[3] This court's review of the records of the clerk of the circuit court of Cook County discloses that the eavesdropping shit was ultimately voluntarily dismissed subsequent to the trial in this matter.

would have been paid to Burris if these efforts were "successful."

Roland Burris also testified in this trial that Stroud contacted him for advice regarding "a potential criminal matter." Stroud told Burris that he had tried to get the Tinley Park police to investigate "a possible eavesdropping incident." Stroud asked Burris to contact the Tinley Park police to determine whether charges would be filed. Burris spoke with the police chief, who advised him that this was the State's Attorney's decision. Burns then spoke with the assistant State's Attorney handling the matter, who advised him that he was still looking into whether to pursue charges. Several weeks later, the assistant State's Attorney called Burris back and informed him that there were no grounds to prosecute. Burns related this information to Lonnie Radcliffe, the executive vice-president of Jovon, and advised him that if the prosecuting body decided not to pursue charges, there was nothing that Stroud or Jovon could do to pursue Blount criminally. Contrary to Stroud's testimony, Burns maintained that Stroud did not pay him for doing this, nor did Burns believe that his contact with the State's Attorney's office was inappropriate.

Following the conclusion of the evidence, the court instructed the jury on defamation, intentional infliction of emotional distress, and a single claim of retaliation predicated on both Blount's "support" for Fouts's claim as well as her refusal to commit perjury. The court also gave the jury the pattern instruction on punitive damages (Illinois Pattern Jury

Instructions, Civil, No. 35.01 (2005 ed.)). Following deliberations, the jury returned a verdict in favor of Blount on her retaliation claim and in favor of defendants on the defamation and intentional infliction of emotional distress claims. The jury awarded Blount $257,350 in back pay, $25,000 for physical and/or emotional pain and suffering, and $2.8 million in punitive damages. The court subsequently awarded Blount $1,182,832.10 in attorney fees under section 1988 of the Civil Rights Act (42 U.S.C. §1988 (2000)).

Thereafter, defendants filed a posttrial motion contending, *inter alia*, that they were entitled to a judgment notwithstanding the verdict and/or remittitur because the harm to Blount was not substantial enough to warrant punitive damages, the amount of the punitive damages awarded was unreasonable, and because the verdict was the product of numerous evidentiary errors, including the admission of evidence illegally obtained via eavesdropping. The circuit court denied the motion. Defendants subsequently filed this timely appeal.

As noted, in 2007, we reversed the jury's verdict after finding that the circuit court lacked subject matter jurisdiction over Blount's retaliation claim under the Illinois Human Rights Act (775 ILCS 5/1-101 *et seq.* (West 2006)). The supreme court subsequently reversed our decision and remanded the cause to us to consider defendants' remaining contentions on appeal. *Blount v. Stroud*, 232 Ill. 2d 302 (2009).

Therefore, we begin by addressing defendants' second argument, in which they claim they are entitled to judgment notwithstanding the verdict because Blount's retaliation claim was not cognizable under section 1981 of the United States Civil Rights Act of 1991 (42 U.S.C. §1981 (2000)). Specifically, defendants maintain that a retaliation claim is not contemplated by section 1981 and that, therefore, the jury's verdict in favor of Blount cannot stand as a matter of law. Defendants do not contest the sufficiency of Blount's evidence to support such a claim if it is cognizable under section 1981.

Section 1981 guarantees that all people within the United States have the same right as "white citizens" in every state and territory to make and enforce contracts. 42 U.S.C. §1981 (2000); *see also Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 474, 163 L. Ed. 2d 1069, 1075, 126 S. Ct. 1246, 1249 (2006) (discussing section 1981). Thus, in order to state a claim under section 1981, a plaintiff must establish proof of a contractual relationship or a would-be contractual relationship. *McDonald*, 546 U.S. at 476, 163 L. Ed. 2d at 1075-76, 126 S. Ct. at 1249-50. Although at-will employees lack a fixed duration of employment, there are nevertheless contractual aspects to an at-will employment relationship, such as wages, benefits, duties, and working conditions. *Walker v. Abbott Laboratories*, 340 F.3d 471, 476-77 (7th Cir. 2003). Thus, the protections of section 1981 also apply in the context of an at-will employment relationship.

Walker, 340 F.3d at 477. Also, despite the language of section 1981, a "white citizen" can sue under the section where she has been discriminated against in favor of a racial minority. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 286-87, 49 L. Ed. 2d 493, 504, 96 S. Ct. 2574, 2582 (1976).

However, section 1981 does not specifically mention retaliation. See 42 U.S.C. §1981 (2000). At the time defendants filed their brief in this cause, the circuits of the United States Court of Appeal were split over whether section 1981, as amended by the Civil Rights Act of 1991, provided an avenue of recourse for individuals who had suffered retaliation for advocating for the rights of those protected under section 1981. *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 401 (7th Cir. 2007), citing *Foley v. University of Houston System*, 355 F.3d 333, 339 (5th Cir. 2003), *Hawkins v. 1115 Legal Service Care*, 163 F.3d 684, 693 (2d Cir. 1998), *Andrews v. Lakeshore Rehabilitation Hospital*, 140 F.3d 1405, 1412-13 (11th Cir. 1998), and *Barge v. Anheuser-Busch, Inc.*, 87 F.3d 256, 259 (8th Cir. 1996); *see also Carney v. American University*, 151 F.3d 1090, 1094-95 (D.C. Cir. 1998) (assuming, without a discussion of the issue, that section 1981 encompasses retaliation claims); *see also Humphries*, 474 F.3d at 411 (Easterbrook, J., dissenting) (concluding that "[s]ection 1981 does not offer one opening for a claim in the nature of retaliatory discharge"); *Little v. United Technologies, Carrier*

Transicold Division, 103 F.3d 956, 961 (11th Cir. 1997) (concluding that because section 1981 is different from Title VII, the type of discrimination it proscribes must be different and holding that section 1981 does not encompass retaliation claims).

Since that time, the United States Supreme Court has definitively held that section 1981 does encompass retaliation claims filed by individuals who have tried to help others who have suffered racial discrimination. *CBOCS West, Inc. v. Humphries*, ___ U.S. ___, 170 L. Ed.2d 864, 877, 128 S. Ct. 1951, 1961 (2008). Thus, Blount's retaliation claim was proper under section 1981 as a matter of law.

Defendants' third contention is similarly resolved by *CBOCS West*. Defendants claim that the trial court erred in awarding Blount attorney fees for her retaliation claim under section 1988 of the Civil Rights Act. 42 U.S.C. §1988 (2000). Section 1988 provides the trial court with the discretion to award reasonable attorney fees to a prevailing party in a section 1981 action. 42 U.S.C. §1988 (2000). Defendants maintain that because Blount's claim was not legally cognizable under section 1981, section 1988 is not applicable. Defendants do not contest whether the amount of the fees awarded was reasonable but only the applicability of section 1988. As noted above, Blount's claim was cognizable under section 1981. *See CBOCS West*, ___ U.S. ___, 170 L. Ed. 2d at

877, 128 S. Ct. at 1961. Therefore, an award of fees under section 1988 was permissible here.

Defendants' fourth contention on appeal is that the trial court erred in submitting Blount's request for punitive damages to the jury. Defendants claim that Blount failed to adduce sufficient proof of aggravated circumstances, such as willfulness, wantonness, fraud, or malice on the part of Stroud, to justify submission of the punitive damages to the jury. Defendants cite the fact that the amount of punitive damages, roughly $2.8 million, was significantly more than the amount of compensatory damages, $25,000 for physical and emotional harm and $257,350 for back pay, as an indication that punitive damages were inappropriate here.

Punitive damages may be awarded where retaliatory discharge has been committed with fraud, actual malice, deliberate violence or oppression, or when the defendant has acted willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others. *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 186 (1978); *see also Loitz v. Remington Arms Co.*, 138 Ill. 2d 404, 415 (1990), quoting Restatement (Second) of Torts §908(2) at 464 (1979) ("'Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others'."). Thus, "willful and wanton" misconduct "'approaches the degree of moral blame attached to intentional harm'." *Loitz*, 138 Ill. 2d at 416, quoting *Bresland v. Ideal Roller & Graphics Co.*, 150 Ill. App. 3d 445, 457 (1986), quoting Restatement (Second) of Torts §886A,

Comment K at 342 (1979). The purpose of punitive damages is not to compensate the plaintiff but, rather, to punish the defendant and to deter others from engaging in such conduct. *Bates v. William Chevrolet/Geo, Inc.*, 337 Ill. App. 3d 151, 160 (2003).

Although the amount of punitive damages to be awarded is a jury question, the preliminary question of whether the facts of a particular case justify the imposition of punitive damages is a question of law. *Kelsay*, 74 Ill. 2d at 186. We accordingly review *de novo* the trial court's decision to submit the question of punitive damages to the jury. *Gomez v. The Finishing Co.*, 369 Ill. App. 3d 711, 721 (2006).

Here, the evidence was sufficient to show that Stroud acted willfully and wantonly in retaliating against Blount. The record discloses that on numerous occasions, Stroud tried to influence Blount's decision to testify on behalf of Fouts. Stroud offered Blount money and her job back, and asked her to "forget about" this lawsuit. Stroud also asserted his wealth, power, and connections, giving Blount a picture of himself with President Clinton and telling her that she did not know who she was "fucking with." Stroud also tried to use his connections to have Blount prosecuted criminally for eavesdropping, contacting Roland Burris to attempt to make that happen. Stroud did this to make her "suffer" some of the same consequences that he had "suffered" in having to defend a lawsuit with the objective of getting her to back down. However, most significantly, Stroud threatened Blount on more than one occasion, telling her that he could cause her to

"cease to exist." Blount perceived these comments as threats on her life.

The record also discloses that Stroud consciously disregarded the rights of Fouts and Blount. Despite Fouts's requests, Stroud failed to do anything regarding Howell's treatment of Fouts. When he later received her EEOC charge, he dismissed it as "legalese." Stroud also admitted that he knew it was "illegal" to fire someone in retaliation for testifying. Although Stroud testified that he terminated Blount because of allegations that she had diverted business, Stroud admitted that he had no proof that she had done so and terminated her anyway. Stroud also offered Blount money and her job back and asked her to "forget about" this lawsuit. These facts show a conscious disregard for the rights of Blount and Fouts, as well as a sense of being above the law. It was therefore proper to submit the issue of punitive damages to the jury. *See, e.g., Hollowell v. Wilder Corp.*, 318 Ill. App. 3d 984, 989 (2001).

Further, Illinois follows the Restatement analysis of punitive damages. *See Loitz*, 138 Ill. 2d at 415-16. Thus, even if it could be said that the compensatory damages awarded were "a trifling amount" in comparison to the punitive damages award, it would not mean that the punitive damages award was inconsistent or inappropriate. Restatement (Second) of Torts §908, Comment C (1979). We therefore find no error in the submission of the punitive damages claim to the jury.

Defendants' fifth contention on appeal is that the amount of punitive damages awarded by the jury was excessive and should be remitted. Defendants challenge the amount of damages under the Illinois common law standard and under the federal due process standard. We will address each in turn.

The Illinois common law punitive damages inquiry is distinct from the constitutional challenge. *Franz v. Calaco Development Corp.*, 352 Ill. App. 3d 1129, 1147 (2004), citing *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 450, 149 L. Ed. 2d 674, 696, 121 S. Ct. 1678, 1693 (2001). Under the Illinois standard, once the court has determined as a matter of law that punitive damages can be awarded for a particular cause of action, it is for the jury to decide based on the evidence presented whether the defendant's conduct was sufficiently willful or wanton to warrant the imposition of punitive damages. *Cirrincione v. Johnson*, 184 Ill. 2d 109, 116 (1998). The measure of punitive damages to be awarded is also a question for the jury. *Kelsay*, 74 Ill. 2d at 186.

In reviewing a jury's award of punitive damages, relevant circumstances to consider include, but are not limited to, the nature and enormity of the wrong, the financial status of the defendant, and the potential liability of the defendant. *Deal v. Byford*, 127 Ill. 2d 192, 204 (1989). However, each case must be assessed in light of the specific facts and circumstances involved, and the underlying purpose of a punitive damage award must be satisfied. *Deal*, 127 Ill. 2d at 204.

The amount of a punitive damages award will not be reversed unless it is so excessive that it must have been a result of passion, partiality, or corruption. *Franz*, 352 Ill. App. 3d at 1139. Although the purpose of punitive damages is to punish and deter wrongful conduct, juries have been charged with their determination because they depend so closely upon the jury's fact finding.

Franz, 352 Ill. App. 3d at 1142. Because a jury's determination of the amount of punitive damages is a predominately factual issue, we will not reverse a jury's determination as to the amount of punitive damages unless it is against the manifest weight of the evidence. *Cirrincione*, 184 Ill. 2d at 116; *Franz*, 352 Ill. App. 3d at 1145.

Here, although Stroud testified that he did not operate Jovon Broadcasting on a racial basis and denied that he tried to threaten or intimidate Blount into doing as he wished, as set forth above, there was ample other evidence from which the jury could have drawn a different conclusion. Specifically, Blount, Fouts, and Stroud's executive assistant each testified that Stroud had a very bad temper and that there were racial tensions at Jovon. The record also revealed that Stroud disregarded these allegations of racism and sexism. Blount testified that Stroud threatened her on more than one occasion and that Stroud attempted to intimidate her with his wealth, power, and connections. Blount also presented adverse testimony from Roland Burns, the Tinley Park police chief, and other employees of Jovon which evidenced how Stroud attempted to use his

connections to prevent Blount from testifying that she had witnessed racial and sexual harassment of Fouts. In making its credibility determinations, the jury also had the opportunity to observe Stroud's demeanor on the witness stand. The jury could have resolved these issues of credibility against Stroud and could have found his conduct to have been egregious enough to warrant punitive damages. Recognizing that the appellate court is not in the position to reassess the credibility of witnesses (*Franz*, 352 Ill. App. 3d at 1144), we will not second-guess the jury's credibility determinations here.

Regarding the amount of the damages, although $2.8 million is significantly more than the amount of compensatory damages awarded, under the Illinois common law analysis, there is no requirement that the amount of punitive damages imposed on a defendant bear any particular proportion to the size of the plaintiff's compensatory recovery. *Deal*, 127 Ill. 2d at 204. Once again, the jury heard evidence of not only the racially charged atmosphere at Jovon, but also of Stroud's attitude, his attempts to use his power and connections to intimidate and threaten, and also his substantial wealth. In his trial testimony, Stroud admitted that he was a "millionaire" and that he donated $1.5 million to Roland Burris's 2002 gubernatorial campaign and "a couple of hundred thousand dollars" to President Clinton's efforts to relieve H.I.V. in Africa. The parties stipulated that Stroud's net worth was $87.5 million.

Juries have the unique ability to "articulate community values" and evaluate "the reprehensibility of a defendant's conduct for the purposes of awarding punitive damages." *Franz*, 352 Ill. App. 3d at 1144 The jury could have found the nature of Stroud's conduct to be egregious, and when factored against his substantial wealth, it could have determined that Stroud's conduct warranted $2.8 million dollars in punitive damages. This amount represents roughly 3% of Stroud's net worth, and we cannot say that this sum was the result of passion or prejudice on the part of the jury. *See, e.g., O'Neill v. Gallant Insurance Co.*, 329 Ill. App. 3d 1166, 1185 (2002) (upholding punitive damage award of 10% of the defendant's net worth for a breach of fiduciary duty); *Howard v. Zack Co.*, 264 Ill. App. 3d 1012, 1028 (1994) (upholding punitive damage award of 5% of defendant's net worth in retaliatory discharge action).

Defendants next claim that the jury's award of $2.8 million in punitive damages was so excessive that it violated their constitutional right to due process. This analysis differs significantly from the Illinois common law analysis.

The due process clause of the fourteenth amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor because such awards serve no legitimate purpose and constitute an arbitrary deprivation of property. *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 417, 155 L. Ed. 2d 585,

600, 123 S. Ct. 1513, 1519-20 (2003). Punitive damage awards generally serve the same purposes of punishment and deterrence as criminal penalties; however, they are not subject the protections applicable to a criminal proceeding. *Campbell*, 538 U.S. at 417, 155 L. Ed. 2d at 601, 123 S. Ct. at 1520. Instead, they are "imprecisely" determined by juries with wide discretion to choose amounts. *Campbell*, 538 U.S. at 417, 155 L. Ed. 2d at 601, 123 S. Ct. at 1520. Further, the United States Supreme Court has expressed "concern" that juries may be basing their awards on "'biases against big businesses, particularly those without strong local presences'." [Citation.] *Campbell*, 538 U.S. at 417, 155 L. Ed. 2d at 601, 123 S. Ct. at 1520.

Accordingly, the Court developed the following three guideposts to determine whether an award of punitive damages by a jury comports with due process: (1) the degree of reprehensibility of the conduct; (2) the disparity between the harm or potential harm suffered by the plaintiff and the amount of punitive damages awarded; and (3) the difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575, 134 L. Ed. 2d 809, 826, 116 S. Ct. 1589, 1598-99 (1996). We are to apply these factors using *a de novo* standard of review in order to ensure that the punitive damages award is based upon the "'application of law, rather than a decisionmaker's caprice'." *Cooper Industries*, 532 U.S. at 436, 149 L. Ed. 2d at 687, 121 S. Ct. at 1685,

quoting *Gore*, 517 U.S. at 587, 134 L. Ed. 2d at 834, 116 S. Ct. at 1605 (Breyer, J., concurring).

The Court has explained that the first factor, the degree of reprehensibility of the defendant's conduct, is the most important. *Gore*, 517 U.S. at 575, 134 L. Ed. 2d at 826, 116 S. Ct. at 1599; *see also Campbell*, 538 U.S. at 419, 155 L. Ed. 2d at 602, 123 S. Ct. at 1521. In evaluating the reprehensibility of the defendant's conduct, the Court has instructed us to consider whether: (1) the harm caused was physical as opposed to economic; (2) the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of intentional malice, trickery, or deceit, or mere accident. *Campbell*, 538 U.S. at 419, 155 L. Ed. 2d at 602, 123 S. Ct. at 1521. The existence of only one of these factors weighing in the plaintiffs favor may not be sufficient to sustain a punitive damage award, and the existence of none of these factors in the plaintiffs favor would render the award suspect. *Campbell*, 538 U.S. at 419, 155 L. Ed. 2d at 602, 123 S. Ct. at 1521.

Here, all but one of these factors weigh in favor of the jury's verdict. Regarding the first sub-factor, although the harm to Blount was primarily emotional and economic, she also suffered some physical manifestations of psychological harm, including anxiety attacks and an esophageal infection. Moreover, Stroud also threatened Blount, informing

her that he could cause her to "cease to exist" and that she "didn't know who she was fucking with." Blount understood these comments to be threats of physical harm or threats on her life. Such threats of physical violence are regarded as more reprehensible than nonviolent conduct, and actual physical harm need not occur to establish reprehensibility. *Mendez-Matos v. Municipality of Guaynabo*, 557 F.3d *36*, 53 (1st Cir. 2009). These threats make the harm in this case more reprehensible than a retaliation case involving strictly emotional and economic harm. *See, e.g., Daka, Inc. v. McCrae*, 839 A.2d 682, 699-700 (D.C. App. 2003).

Regarding the third subfactor, Blount was a financially vulnerable single mother of two. Stroud knew this and sought to use her position as the sole provider for her children to persuade her to not support Fouts. Stroud told her that "Bonnie didn't pay your bills," that he did, and that she should do what he said so that she and her children did not "go over a cliff" financially. Courts have recognized single mothers such as Blount to be financially vulnerable. *See, e.g., Watson v. E.S. Sutton, Inc.*, No. 02 Civ. 2739(KMW), slip op. at 17 (S.D.N.Y. September 6, 2005).

Regarding the fourth subfactor, we may consider the defendant's conduct toward the plaintiff as well as the defendant's related conduct toward other parties. *International Union of Operating Engineers, Local 150 v. Lowe Excavating Co.*, 225 Ill. 2d 456, 480 (2006). Conduct is related if it is factually and legally similar. *Williams v. ConAgra*

Poultry Co., 378 F.3d 790, 797 (8th Cir. 2004). Here, Stroud's conduct was repeated toward Blount and Fouts. Stroud threatened Blount on multiple occasions and tried to influence her to not testify on behalf of Fouts numerous times. Further, not only did Stroud terminate Blount for her engagement in protected activity, he also terminated Fouts based on hers. Cathy Harden also testified that she was teased for being "white." Although this evidence does not necessarily rise to the level of being a "pattern" of misconduct against numerous individuals, it nevertheless weighs in favor of upholding the punitive damages award. *Cf. Williams*, 378 F.3d at 797-98 (factually similar instances of racism against the plaintiff and against numerous other employees established a pattern of misconduct).

Regarding the fifth and final subfactor, the evidence shows intentional malice on the part of Stroud. Stroud's conduct and statements show that he intended to not only threaten and intimidate Blount, but also to make her suffer. Specifically, Stroud testified at trial that he wanted to have Blount criminally charged and to sue her civilly for eavesdropping to cause her to "suffer some of the consequences" of having to defend a lawsuit. Further, Stroud repeatedly threatened Blount. Stroud's actions in giving Blount the photograph of himself with President Clinton and in contacting Roland Burris also show that he intended to use his power and influence to induce Blount to do as he wanted without regard for what had actually

happened to Fouts. *See, e.g., Lowe Excavating Co.*, 225 Ill. 2d at 482-83 (finding intentional malice where the defendant union picketed the plaintiff with signs that it knew were false in order to interfere with the plaintiff s business).

In conclusion, the evidence in the record shows that Stroud's conduct was significantly reprehensible. Stroud's threats and attempts to use his wealth and power to silence Blount compound the allegations of racism and sexism underlying the case and raise it to a level of conduct warranting a significant amount of punitive damages.

Regarding the second factor of the Gore analysis, we are to consider the ratio between the punitive damages awarded compared with the amount of "actual harm" sustained by the plaintiff. *Lowe Excavating Co.*, 225 Ill. 2d at 483. To that end, the Supreme Court has cautioned that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety," and that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Campbell*, 538 U.S. at 425, 155 L. Ed. 2d at 606, 123 S. Ct. at 1524. However, the Court has also made clear that the constitutional limit for the amount of punitive damages that may be awarded cannot be reduced to a "'simple mathematical formula'." *Lowe Excavating Co.*, 225 Ill. 2d at 484, quoting *Gore*, 517 U.S. at 582, 134 L. Ed. 2d at 830-31, 116 S. Ct. at 1602.

Here, the jury awarded Blount a total of $282,350 in compensatory damages, of which $25,000 was for Blount's physical and/or emotional pain and suffering and the balance was to compensate her for back pay. When compared to the punitive damage award of $2.8 million, the ratio would be roughly 10 to 1. However, Blount was also awarded $1,182,832.10 in attorney fees and costs under section 1988 of the Civil Rights Act. 42 U.S.C. § 1988 (2000). In Illinois, our supreme court has recognized that the amount of attorney fees expended in a case may be taken into account when assessing the propriety of a punitive damage award. *Lowe Excavating Co.*, 225 Ill. 2d at 490. A wealthy defendant can mount an extremely aggressive defense, and the prospect of costly litigation can deter lawyers from representing plaintiffs in such cases. *Lowe Excavating Co.*, 225 Ill. 2d at 490, citing *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003). Therefore, the economic cost of the litigation is a relevant consideration to factor into the side of the ratio that quantifies the amount necessary to make the plaintiff whole. *See Lowe Excavating Co.*, 225 Ill. 2d at 490; *Kirkpatrick v. Strosberg*, 385 Ill. App. 3d 119, 136 (2003). We further note that the majority of the courts across the country that have considered this issue have agreed that an award of attorney fees should be taken into account as part of the compensatory damages factor in the *Gore* analysis. *See, e.g., Willow Inn, Inc. v. Public Service Mutual Insurance Co.*, 399 F.3d 224, 236-37 (3d Cir. 2004); *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d

634, 642 (10th Cir. 1996); *Walker v. Farmer's Insurance Exchange*, 153 Cal. App. 4th 965, 973 n.8, 63 Cal. Rptr. 3d 507, ___ n.3 (2007); *Girdner v. Rose*, 213 S.W.3d 438, 449 (Tex. App. 2006); but see *Laymon v. Lobby House, Inc.*, No. 07-129-MPT, slip op. at 6 (D. Del. May 1, 2009) (in a Title VII case, holding that attorney fees should not be considered in the ratio because they are expressly excluded from compensatory damages under section 198 1a(b)). Indeed, as the Tenth Circuit pointed out, nothing in Gore prohibits consideration of the costs incurred by the plaintiff in bringing the legal proceedings to vindicate rights as part of the "actual harm" suffered. *Continental Trend Resources*, 101 F.3d at 642.

We therefore take the attorney fee award into account as part of the "actual harm" suffered by Blount. Adding the amount of the fee award to Blount's compensatory damages, the ratio is less than 2 to 1 — 1.8 to 1 to be exact. This is well within the permissible guideline. *See, e.g., Kirkpatrick*, 385 Ill. App. 3d at 136 (taking attorney fees into account where no compensatory damages were awarded and finding a ratio of 3.5 to 1 permissible).

The final *Gore* factor is "the disparity between the punitive damages award and the 'civil penalties authorized or imposed in comparable cases'." *Campbell*, 538 U.S. at 428, 155 L. Ed. 2d at 607-08, 123 S. Ct. at 1526, quoting *Gore*, 517 U.S. at 575, 134 L. Ed. 2d at 826, 116 S. Ct. at 1598-99. On this factor, the parties analogize to criminal fines and penalties for assault and suborning perjury.

Although the Supreme Court in the past directed us to consider criminal penalties, the Court has since recognized that analogy to criminal penalties has little utility when used to determine dollar amounts. *Campbell*, 538 U.S. at 428, 155 L. Ed. 2d at 607-08, 123 S. Ct. at 1526. We will therefore not consider criminal penalties. The parties do not discuss comparable civil sanctions in their briefs. They obviously failed to recognize that *Gore* also requires consideration of comparable civil penalties. *Campbell*, 538 U.S. at 428, 155 L. Ed. 2d at 607-08, 123 S. Ct. at 1526, quoting *Gore*, 517 U.S. at 575, 134 L. Ed. 2d at 826, 116 S. Ct. at 1598-99.

The closest analog to a section 1981 retaliation claim would be a retaliation claim under Title VII. *See Williams*, 378 F.3d at 798 (analogizing a section 1981 harassment claim to a Title VII harassment claim in assessing the third *Gore* factor). The amount of damages available under Title VII is capped based on the number of employees employed by the defendant, and the highest amount available is $300,000.[4] 42 U.S.C. §1981a(b) (2000); *see also Williams*, 378 F.3d at 798. The Illinois Human Rights Act also provides a civil means of redress for retaliation. 775 ILCS 5/6-101(A) (West 2006). However, under the Illinois Human Rights Act as it existed at the time Blount filed her complaint, punitive damages were not available. *See, e.g., Cummings v. Iron Hustler Corp.*, 118 Ill. App. 3d

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[4] The record does not indicate how many individuals are employed by Jovon.

327, 333 (1983). The fact that these other means of redressing retaliation authorize substantially lower amounts of damages seems to mitigate against the amount of Blount's punitive damages. However, the federal courts have repeatedly recognized that the fact that section 1981 does not contain such limits should not weigh against the damage award unless there is a "huge discrepancy." *See, e.g., Williams*, 378 F.3d at 798; *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020, 1045 (9th Cir. 2003). For instance, in *Williams*, the court found a $6 million punitive damage award where only $300,000 would be authorized under Title VII to warrant remittitur. *Williams*, 378 F.3d at 798-99. There is not such a "huge discrepancy" here. The amount of punitive damages awarded was roughly $2.8 million, which is less than half of what the court found to be invalid in *Williams*. *Williams*, 378 F.3d at 798-99; *see also Zhang*, 339 F.3d at 1045 (finding a $2.6 million award to not be a "huge discrepancy" from the $300,000 limit).

Further, we must also consider the amount of damages imposed in similar cases. *Campbell*, 538 U.S. at 428, 123 S. Ct. at 1526, 155 L. Ed. 2d at 607-08, quoting *Gore*, 517 U.S. at 575, 134 L. Ed. 2d at 826, 116 S. Ct. at 1598-99. Penalties in the neighborhood of the amount awarded to Blount here have been upheld for similar 1981 claims. *See, e.g., Zhang*, 339 F.3d at 1045 (upholding a $2.6 million punitive damage award in a section 1981 action alleging that the plaintiff had been harassed and terminated based on his ethnicity). For these

reasons, we find that the amount of punitive damages awarded to Blount here comports with due process.

Defendants also suggest that the jury was improperly instructed on punitive damages. Specifically, they argue that the nonpattern instruction they tendered should have been given instead of the pattern instruction. However, the record discloses that defendants withdrew the instruction they offered. Therefore, they have forfeited any objection to the use of the pattern instruction. *See Lawler v. MacDuff*, 335 Ill. App. 3d 144, 149 (2002).

Defendants' final overarching contention on appeal is that the trial court erred in denying their motion for a new trial where five separate evidentiary errors committed during the trial unfairly prejudiced them and tainted the jury's verdict. We will address each claim separately. We review a trial court's decision regarding the admissibility of evidence for abuse of discretion. *Aguirre v. City of Chicago*, 382 Ill. App. 3d 89, 98 (2008). An abuse of discretion occurs only when no reasonable person would rule as the trial court did. *Aguirre*, 382 Ill. App. 3d at 98.

Defendants first contend that the trial court abused its discretion in permitting Blount to present evidence regarding Stroud's "assertion of his legal rights" to pursue Blount criminally and civilly for eavesdropping. Defendants claim that the admission of this evidence violated their first amendment rights

to petition the government for redress and the *Noerr-Pennington* doctrine. *United Mine Workers of America v. Pennington*, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961).

Among other rights, the first amendment confers the right to petition the government for redress of grievances through the courts, by lobbying government, and by other means. *Bill Johnson's Restaurants, Inc. v. National Labor Relations Board*, 461 U.S. 731, 741, 76 L. Ed. 2d 277, 288, 103 S. Ct. 2161, 2169 (1983); *King v. Levin*, 184 Ill. App. 3d 557, 559 (1989). The Noerr-Pennington doctrine, in essence, provides that parties who petition the government for action favorable to their position cannot be sued under the Sherman Act (15 U.S.C. § *1 et seq.* (West 2000)) even though their actions are motivated by anticompetitive intent. *Stahelin v. Forest Preserve District*, 376 Ill. App. 3d 765, 776 (2007). The *Noerr-Pennington* doctrine has been adopted for claims outside of the antitrust area, such as tortious interference with prospective economic advantage. *King*, 184 Ill. App. 3d at 560. The doctrine is usually applied where one party has sought to thwart another party's right of access to the courts for redress of grievances. *See, e.g., Tarpley v. Keistler*, 188 F.3d 788, 794 (7th Cir. 1999).

Here, Blount did not attempt to thwart defendants' right to seek redress in the court system. Indeed, defendants have already had their "day in

court" on their civil eavesdropping claim against Blount. Instead, Blount used evidence of Stroud's statements and actions regarding the eavesdropping claim as circumstantial evidence of Stroud's state of mind, specifically, his retaliatory animus.

Defendants have not cited, nor has the court found, any authority to suggest that the *Noerr-Pennington* doctrine is applicable here. To the contrary, the United States Supreme Court has suggested that *Noerr-Pennington* does not prohibit the use of such evidence for this purpose. *See Pennington*, 381 U.S. at 670 n.3, 14 L. Ed. 2d at 636 n.3, 85 S. Ct. at 1593 n.3. Specifically, the Court held that "[i]t would of course still be within the province of the trial judge to admit this evidence, if he deemed it probative and not unduly prejudicial, under the 'established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny'." *Pennington*, 381 U.S. at 670 n.3, 14 L. Ed. 2d at 636 n.3, 85 S. Ct. at 1593 n.3. Relying upon *Pennington*, other federal decisions have found that *Noerr-Pennington* does not bar the admission of evidence of a party's petitioning the government where the purpose of that evidence is not to thwart the right of access, but to show an improper purpose. *See, e.g., Telecor Communications, Inc. v. Southwestern Bell Telephone Co.*, 305 F.3d 1124, 1137-38 (10th Cir. 2002).

Further, there is a "sham" litigation exception to the *Noerr-Pennington* doctrine, which applies when a defendant petitions the government with no realistic expectations of a favorable result, but merely to force expense and delay on the other party. *Stahelin*, 376 Ill. App. 3d at 776. An example of "sham" litigation would be filing baseless litigation for the purpose of harassing the other party. *See King*, 184 Ill. App. 3d at 567.

The purpose of Blount's seeking to admit the evidence surrounding the eavesdropping suit was precisely to show such an improper purpose on the part of defendants, namely their intent to harass and intimidate her. We therefore cannot say that the trial court abused its discretion in admitting that evidence.

The second evidentiary error cited by defendants is that the trial court abused its discretion in allowing courtroom testimony from the eavesdropping action to be used for impeachment. Defendants claim that this was a violation of Article 14 of the Illinois Criminal Code of 1963 (720 ILCS 5114-1 *et seq.* (West 2000)), which pertains to eavesdropping.

The article 14 of the Criminal Code generally prohibits the surreptitious recording of conversations. 720 ILCS 5/14-2 (West 2000). Section 14-5 specifically prohibits evidence obtained in violation of the eavesdropping statute from being used in any criminal or civil proceeding. 720 ILCS 5/14-5 (West 2000). However, Blount never

introduced or sought to introduce the surreptitiously recorded conversations into evidence. Rather, she used testimony adduced in the civil eavesdropping action in the present trial to impeach the testimony of Stroud and others regarding their efforts to induce her to not testify on behalf of Fouts. Although section 14-5 prohibits the use of surreptitiously recorded material from being used, it in no way prohibits the use of courtroom testimony from a civil eavesdropping action from being used for impeachment in a later proceeding. *See* 720 ILCS 5/14-5 (West 2000); *see also People v. Seehausen*, 193 Ill. App. 3d 754, 761 (1990) (holding that sworn statements independent from surreptitiously recorded material were not prohibited by section 14-5). Therefore, we cannot say that the trial court abused its discretion when it permitted Blount to use testimony from the eavesdropping suit for impeachment.[5]

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[5] Section 14-3 also contains an exemption for recordings made by private individuals who are a party to a conversation and under reasonable suspicion that another party to the conversation is committing, is about to commit, or has committed a criminal offense against that individual or a member of his immediate household. 720 ILCS 5/14-3(i) (West 2000). Here, where Blount believed that Stroud was threatening her life, she would arguably come within that exception. Compare *In re Marriage of Jawad*, 326 Ill. App. 3d 141, 144 (2001) (trial court admitted surreptitious recording of statement by husband threatening that wife would "not see" their daughter "at age 11" under this exemption), with *People v. Nestrock*, 316 Ill. App. 3d 1, 9 (2000) (finding that a recording made for the purpose of assisting with investigating a crime, but where there was no threat of harm to the parties who made the recording, did not come within the

Third, defendants contend that the trial court abused its discretion in admitting the videotaped depositions of Wallace Ray Davis and Robert Klenk, the president and sales manager, respectively, of the firm that hired Blount after her termination from Jovon. In those depositions, Davis and Klenk related that shortly after they hired Blount, Shawn Hill from WJYS telephoned them and told them that Jovon had "filed criminal charges" against Blount and that she had "pulled some real Shenanigans" while she was employed there. Davis also testified that he later determined that Blount was a "model" employee and that he had an unfavorable impression of the way Jovon conducted its business. Defendants claim that this testimony was prejudicial, irrelevant, and improperly bolstered Blount's testimony.[6]

Defendants fail to recall that Blount also raised a defamation claim in her complaint, which was based on these specific allegations. This testimony was therefore relevant to those claims, and the court found as much when it ruled on defendants' motion to bar the use of that testimony at trial. The court further found that the truth or falsity of the testimony was an issue of fact for the jury to decide.

---

exemption). Indeed, as set forth in our discussion of the facts adduced at trial, the Cook County State's Attorney determined that there were no grounds to prosecute Blount criminally.

[6] In response, Blount contends that this issue cannot be reviewed because the depositions are not in the record. However, our examination of the record has revealed that these items were contained in the record. Therefore, we may review the issue.

Thus, we cannot say that the trial court abused its discretion in admitting the testimony. *Cf. Popko v. Continental Casualty Co.*, 355 Ill. App. 3d 257, 266 (2005) (finding evidence of an employee's status as an "at-will" employee was not relevant to whether he had been terminated as a result of defamatory remarks).

Defendants' fourth evidentiary claim is that the trial court abused its discretion in admitting hearsay statements of Cathy Harden, Stroud's secretary, and Fouts. Defendants challenge two specific aspects of their testimony. First, defendants point to testimony by Harden that when Blount exited the meeting of African-American managers held to discuss Fouts's EEOC charge, she was crying and saying that Stroud wanted her to perjure herself and did not want her "siding" with Fouts. Second, defendants point to Fouts's testimony regarding the epithets that Howell called her, such as "the white bitch."

The admission of these two categories of statements does not entitle defendants to a new trial. Regarding at least the second category of statements, which were those related by Fouts, we cannot say that these statements were hearsay because they were not offered for the truth of the matter asserted. *See, e.g., Leonardi v. Loyola University Chicago*, 168 Ill. 2d 83, 99 (1995) (explaining that the statement of witness A testifying that "'B told me that event X occurred'" would be inadmissible if offered to prove that event X occurred but would be admissible if offered to prove that B said event X occurred).

Regarding both categories of statements, even if we could conclude that they were hearsay and improperly admitted, the law is clear that the erroneous admission of hearsay is not grounds for reversal where there was sufficient competent evidence to support the decision. *Cochrane's of Champaign, Inc. v. State Liquor Control Comm'n*, 285 Ill. App. 3d 28, 32 (1996), citing *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 94 (1992). Here, apart from Harden's and Fouts's testimony, there was substantial other testimony to establish that Stroud retaliated against Blount for her engaging in protected activity, including not only testimony from Blount, but also adverse testimony from Stroud, Roland Burris, and others. Further, defendants do not contest the sufficiency of the evidence to support Blount's retaliation claim. Therefore, there is no basis for disturbing the jury's verdict. *See, e.g., Anderson v. Alberto-Culver USA, Inc.*, 337 Ill. App. 3d 643, 668 (2003) (holding that although a report prepared by the National Transportation Safety Board had been improperly admitted into evidence, the error was harmless where there was ample other evidence in the record to support the jury's verdict as to who was flying an airplane at the time of a crash).

Defendants' last claim of evidentiary error is that the trial court abused its discretion in admitting two trial exhibits, numbers 20 and 52, which reflected sales credits of Jovon employees. However, as Blount correctly points out, these items are not contained in the record on appeal. Where, as here, the appellant

has failed to present a sufficient record for review of an issue, we will presume that the trial court's decision on that issue was in conformity with the law and had a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984); *Cannon v. William Chevrolet/Geo, Inc.*, 341 Ill. App. 3d 674, 681 (2003).

For these reasons, we affirm the judgment entered by the circuit court of Cook County.

Affirmed.

APPENDIX C

109370

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

January 27, 2010

Mr. John C. Roberts Jr.
Jenner & Block LLP
353 N. Clark Street
Chicago, IL 60654

No. 109370 - Jerri Blount, respondent, v. Joseph Stroud, Indv., et al., etc., petitioners. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

Burke, J., took no part.

The mandate of this Court will issue to the Appellate Court on March 3, 2010.

APPENDIX D

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
SPRINGFIELD 62701

JULEANN HORNYAK
CLERK OF THE COURT
(217) 782-2035

TELECOMMUNICATIONS DEVICE
FOR THE DEAF
(217) 524-8132

FIRST DISTRICT OFFICE
20TH FLOOR
160 N. LASALLE ST.
CHICAGO 60601
(312) 793-1332

TELECOMMUNICATIONS DEVICE
FOR THE DEAF
(312) 793-6185

April 5, 2010

Mr. Jerold S. Solovy
Jenner & Block LLP
353 N. Clark Street
Chicago, IL 60654

In re: Jerri Blount, respondent, v. Joseph Stroud, Indv., et al., etc., petitioners. Leave to appeal, Appellate Court, First District. No.109370 (1-06-2428, 1-06-2968)

Today the following order was entered in the captioned case:

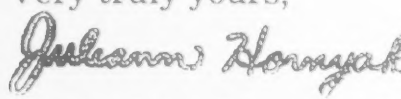
Motion by petitioners for leave to file a motion for reconsideration of the order

denying petition for leave to appeal. Motion Denied.

Order entered by the Court. Burke, J., took no part.

This Court's mandate has issued forthwith to the Appellate Court, First District.

Very truly yours,



Clerk of the Supreme Court

cc: Appellate Court
First District

Ms. Robin B. Potter
Mr. Martin A. Dolan
Mr. John C. Roberts Jr.

APPENDIX E

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

IN THE CIRCUIT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

JERRI BLOUNT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 01 L 002330
	)	
JOSEPH STROUD, an individual; and JOVAN BROADCASTING, WJYS-TV 62/34, an Illinois corporation,	)	
	)	
Defendants.	)	

ORDER AND MEMORANDUM OPINION

This matter came before the Court on Defendants' Post-Trial Motion for Judgment Notwithstanding the Verdict, New Trial, and/or Remittitur. The Court having considered all the written and oral submissions hereby finds as follows:

FACTS

This case was tried in front of a jury in November 2005 on Plaintiff's claims of retaliation, defamation,

and intentional infliction of emotional distress. On November 21, 2005, the jury returned a verdict for Plaintiff on her retaliation claim, but a verdict for Defendants on Plaintiff's claims of defamation and intentional infliction of emotional distress. On the retaliation count, the jury awarded Plaintiff $257,350 in back pay, $25,000 for physical and/or emotional pain and suffering, and $2,800,000 in punitive damages. Defendants set forth three reasons why its motion should be granted, (1) this Court should not have submitted the punitive damages issue to the jury; (2) Plaintiff's retaliation claim is insufficient as a matter of law; and (3) a new trial is necessary to correct trial error.

ANALYSIS

An order for judgment notwithstanding the verdict should not be entered unless the evidence, when viewed in the light most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on the evidence could ever stand. *See McClure v. Owens Corning Fiberglass Corp.*, 188 Ill. 2d 102, 130, 720 N.E.2d 242, 256 (1999). Judgment notwithstanding the verdict is not appropriate if reasonable minds might differ as to inferences or conclusions to be drawn from the facts presented. *See id.* A trial court cannot reweigh the evidence and set aside a verdict merely because the jury could have drawn different inferences or conclusions, or because the court feels that other results are more reasonable. *See id.*

A new trial should be granted if, after weighing the evidence, the court determines that the verdict is contrary to the manifest weight of the evidence where the opposite conclusion is clearly evident or where the findings of the jury are unreasonable, arbitrary and not based upon any of the evidence. *See McClure v. Owens Coming Fiberglass Corp.*, 188 Ill. 2d 102, 130, 720 N.E.2d 242, 256 (1999).

The first claim made by Defendants in support of its motion is that the jury's $2,800,000 punitive damages award cannot stand. Defendants argue that there was not sufficient proof of aggravated circumstances, and therefore, under Illinois law the issue of punitive damages should not have been submitted to the jury. In the alternative, Defendants argue that the amount of punitive damages awarded by the jury was excessive and should be set aside. Defendant claims that the punitive damages awarded to Plaintiff is excessive under Illinois Common Law and under the Due Process Clause of the Fourteenth Amendment.

Plaintiff counters these arguments by arguing that it did meet its burden of showing that Defendants' conduct was reprehensible and punitive damages were an appropriate remedy. Plaintiff argues that there is no support in the trial record to warrant any change in the decision of the jury. Plaintiff also believes that the amount of the punitive award was not excessive under common law or the Constitution.

As previously ruled upon by this Court, we find that Plaintiff did not fail to carry her burden of demonstrating significant proof of aggravated circumstances. There was significant testimony during the trial that demonstrated actual malice, violence, and oppression on the part of Defendants, and also evidence put forth that demonstrated Defendants' conduct involved an element of outrage. We do not find merit in Defendants' argument that the jury's verdict for Defendants on two of the three counts and a $25,000 award for pain and suffering confirm that the jury concluded that Defendants' conduct was not aggravated enough to warrant punitive damages. It is not axiomatic that the verdict rendered by the jury is proof that Plaintiff did not put forth evidence that Defendants' conduct was reprehensible and aggravating.

Under common law, the test for determining excessive punitive damages award is whether it is obvious that the award was the result of passion, partiality, or corruption. *Franz v. Calaco Dev. Corp.*, 352 Ill. App. 3d 1129, 1145 (2nd Dist. 2004). We find that in this case, the award must stand because it does not outrun the justification for awarding punitive damages, namely retribution and deterrence. *See Marek v. Stepkowski*, 241 Ill. App. 3d 862, 871 (1st Dist. 1992). As correctly pointed out by Plaintiff, the amount of a punitive award is a matter of discretion of the jury, and a reviewing court can reduce the award only if the amount is clearly excessive. *Lipke v. Celotex Corp.*, 153 Ill. App. 3d 498, 507-508 (1st Dist. 1987). Courts in

Illinois have applied a three-factor test in determining whether a punitive damage award is excessive: (1) the nature and enormity of the wrong; (2) the financial status of the defendant; and (3) the potential liability of the defendant. *Id.* Based on the evidence submitted at trial, we find that there was enough evidence for the jury to award $2,800;000 in punitive damages. There was significant testimony and evidence to demonstrate the reprehensible nature and significant wrongs committed by Defendants. Also, there was testimony regarding the financial status of Defendants. The third and final factor is usually reserved for products liability cases and is of no import in this case. We again chose not to give any weight to Defendants argument that the amount of pain and suffering damages awarded by the jury supports the conclusion that the punitive damages were excessive.

The punitive damages award of $2,800,000 is not excessive under the Due Process clause of the Constitution, as determined by the three guidepost test set forth by the Supreme Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). *See also State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003). The first and most important guidepost examines the reprehensibility of Defendants' conduct. *Id.* The reprehensibility guidepost requires courts to consider whether the harm was physical, whether the conduct evidenced an indifference to or a reckless disregard for the health and safety of others; whether the conduct was ongoing or isolated; and, whether the

harm was the result of intentional malice, trickery or deceit. We find that there was significant evidence submitted to the jury that demonstrated Defendants' ongoing, intentional, reckless disregard for the health and safety of others, which was further evidenced by the physical threats made to Plaintiff on the part of Defendant Stroud.

The second guidepost looks at the ratio between the compensatory and punitive damages awarded. *Id.* The Supreme Court held that it would not establish a "mathematical bright line between constitutionally acceptable [ratio] and the constitutionally unacceptable [ratio]." *BWM of North America, Inc.*, 517, U.S. 582 (citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). We find that the punitive damages awarded by the jury bears a reasonable relationship to the harm that was likely to result from Defendants' conduct as well as the harm that actually occurred. *Id.* at 581 (citing *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460 (1993)).

The final guidepost instructs courts to examine the disparity between the punitive damages award and the criminal or civil penalties that could be imposed for comparable misconduct. *Id.* at 583. In this case, the conduct of Defendants' was such that, Defendants could have been liable for large civil fines and even criminal sanctions. The evidence submitted to the jury could be enough to support charges of assault and battery, perjury, bribery and other criminal conduct. In light of this, we find that the third guidepost has been satisfied enough to support

the jury's award of punitive damages. Therefore, all three guideposts having been satisfied, we chose not to disturb the jury's findings and will deny Defendants' Motion for Judgment Notwithstanding the Verdict, a Remittitur and/or New Trial on the punitive damage claim.

Defendants' second argument centers on the theory that Defendants are entitled to Judgment Notwithstanding the Verdict on Plaintiff's retaliation claim. Defendant argues that Plaintiff's section 1981 retaliation claim is not viable because Plaintiff did not prove that she was retaliated against on account of her own race. Defendant also believes that this Court lacked jurisdiction over Plaintiff's retaliation claim based on section 1981 and Illinois Common Law.

Plaintiff argues that the Court's decision in denying Defendants' Motion for Directed Verdict on this very issue was based on sound reasoning and should not be reversed. Plaintiff argues that the split in the federal courts' decisions regarding whether section 1981 provides a cause of action for retaliation based on Plaintiff's support for a co-worker's complaints of race discrimination allows for this Court to rule as it did. The Plaintiff points to rulings in the 2nd, 3rd and 6th circuit, that supports this Court's decision that a section 1981 claim may be based on allegations of race retaliation for Plaintiff's attempts at vindicating the rights of a person of another race.

Since our earlier decision on this matter, neither Plaintiff nor Defendants have cited to any new authority, binding or otherwise, that has persuaded this Court to reverse our previous ruling on the interpretation of Section 1981. As we previously decided, after intensive briefing and argument, a section 1981 claim may be based on allegations of race retaliation for opposing the racially discriminatory treatment of a co-worker. We chose not to reverse our previous decision regarding this issue and need not concern ourselves with Plaintiff's waiver argument.

Defendants also argues that the court has no jurisdiction over the Plaintiff's retaliation claims because they are "inextricably linked" with and preempted by the Illinois Human Rights Act ("IHRA") and must be brought before the Human Rights Commission. Plaintiff relies on *Maksimovic v. Tsogalis*, 177 Ill. 2d 511, 687 N.E.2d 21 (1997), to argue that the claims exist independent of any alleged civil rights violation. Specifically, Plaintiff argues that these claims arises out of Plaintiff's unwillingness to commit perjury in a discrimination lawsuit filed against Defendants and Defendants' alleged reaction to Plaintiff's position on that matter.

The allegations of the Plaintiff's retaliation claims are not inextricably linked to claims covered by the IHRA. Rather than alleging that Plaintiff was fired and retaliated against because of her race, these claims allege that she was fired and retaliated against because of her alleged unwillingness to commit perjury and because of her support for Ms.

Fouts' lawsuit. Although the claims offer the inference that Plaintiff's race played a role in Defendants' alleged handling of Ms. Fouts' claim, the counts are more in line with the traditional torts of retaliatory discharge outlined in *Palmateer v. Intl Harvester Co.*, 85 Ill. 2d 124 (1981). Therefore, we deny Defendants' Motion for Judgment Notwithstanding the Verdict on Plaintiff's retaliation claims.

Defendants' third argument in support of its motion is that this Court committed numerous errors at trial that individually prejudiced Defendants and entitle them to a new trial. Specifically, Defendants identify over ten alleged instances of error that support its claim. We will discuss each allegation in turn.

Defendants' first argument is that Defendant' pursuit of its legal remedies is shielded from liability by the First Amendment. Defendant cites to the Noerr-Pennington line of cases and the First Amendment to argue that Defendant Stroud's pursuit of a legal claim under the Illinois Eavesdropping Statute was privileged. Defendants further argue that Plaintiff should have been barred from asserting that filing a report with the Tinley Park Police Department and filing a civil complaint against Plaintiff for violating the Eavesdropping Statute were acts of unlawful retaliation.

Plaintiff argues that on April 22, 2005, this Court denied Defendants' oral motion to bar testimony relating to the filing of criminal charges against Ms.

Blount. Plaintiff counters that any statements made are consistent with previously submitted rule 213(f) Interrogatories, discovery and depositions. In addition, Plaintiff asserts that the Noerr-Pennington doctrine is inapplicable to this case because its purpose is to protect parties' rights to "petition the government for a redress of grievances." (Resp. at 4).

We agree with Plaintiff that neither the First Amendment nor the Noerr-Pennington doctrine bars Plaintiff from asserting that Defendant Stroud's pursuit of criminal charges was retaliatory. "[I]f a suit is withdrawn or otherwise shown to be without merit, the employer has had its day in court." *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 747 (1983). Here, Plaintiff's assertions about Defendant Stroud's withdrawn criminal charge did not prevent him from filing a criminal charge. Furthermore, the Noerr-Pennington doctrine governs against improper government intervention of filing legal claims by private citizens. *See id.* Therefore, we find that this Court did not error because Defendant Stroud's pursuit of a criminal charge is not privileged under the Noerr-Pennington doctrine.

Defendants also argue that this Court erred in allowing Plaintiff to use testimony adduced in the Eavesdropping Action in this trial. Defendants claim that the pre-trial rulings which permitted Plaintiff to use Defendant Stroud's testimony from the Eavesdropping Action to impeach his testimony in the trial of this action and to refresh his recollection were in error. Defendants believe that Defendant

Stroud's testimony is barred on the basis of the "fruit of the poisonous tree" doctrine.

To counter this argument, Plaintiff argues that when this Court ruled on the issue, the Court found that Defendants' authorities do not support its "poisonous tree" position nor do they support prohibiting Plaintiff from confronting Defendant Stroud with his own prior inconsistent statement. Plaintiff points out that the Eavesdropping Act does not enjoin testimony made under oath regarding statements made in conversations that were recorded. *See, e.g., People of the State of Illinois v. Alexander*, 244 Ill. App. 3d 441 (3rd Dist. 1993).

While the Eavesdropping Act does not contain any exception for impeachment in a civil case, we find that it does not contain any prohibition from using the testimony taken under oath regarding statements made in conversations that were recorded. We will not allow Defendant Stroud to shield his inconsistent testimony by analogizing it to the poisonous fruit doctrine. This Court did not error when it permitted Plaintiff to use Defendant Stroud's testimony from the Eavesdropping Action.

Defendants argue that this Court erred in permitting Plaintiff's use of Ray Davis' and Bob Klenk's depositions at trial and in overruling specific objections to that testimony. Specifically, Defendants contend that Plaintiff provided false representations to request leave to take further depositions from Mr. Davis and Mr. Klenk. In the

alternative, Defendants contend that the depositions should have been barred because they are irrelevant.

Plaintiff responds that Mr. Davis' and Mr. Klenk's depositions were secured upon honest representations by Plaintiff's counsel. Furthermore, Plaintiff asserts that depositions are relevant and their admission would further interests of justice. Plaintiff believes that the probative value of the testimony far outweighed any alleged prejudice.

We disagree with Defendants that the statements made by Mr. Davis and Mr. Klenk are irrelevant to Plaintiff's claims. We also find any prejudicial effect was outweighed by the relevancy of the testimony. For these reasons, we find that the Court did not err in allowing the testimony of Davis and Klenk.

Defendants' next point of contention is that Ms. Harden's testimony was hearsay and should not have allowed in. During the trial, the Court overruled Defense Counsel's objection to Ms. Harden's testimony regarding a conversation she had with Plaintiff, during which Plaintiff recounted statements Defendant Stroud made to Plaintiff earlier that day. This Court overruled the objection based on the reasoning that Plaintiff was available for cross-examination. We find there is no reason to reverse the Court's original decision in overruling Defendants' objection and we further find that the admission of this testimony was not highly prejudicial as argued by Defendants.

Defendants also believe that this Court erred in admitting the testimony of Bonnie Fouts regarding

cross-examination opened it up. Even though Defendants argue that they were trying to impeach Ms. Fouts testimony based on an omission from the notes, this Court believes that by doing so, Defendants opened the door to Plaintiffs attempts to rehabilitate its witness using the same material. Therefore, we find that no err occurred in overruling Defendants' objections.

Defendants further believe that this Court erred in admitting Plaintiff's Exhibit 20 and Defendants' Exhibit 52. Defendant believes that these exhibits were not properly authenticated and should not have been introduced into evidence. Because Plaintiff sought to authenticate the exhibits through her own testimony, but had no basis for knowing that the documents were what she claimed them to be, Defendants believe that these documents should not have been admitted. However, we find that based on the testimony received by this Court, there was

enough evidence for the documents to be admitted, and the question of whether or not they were what they were purported to be was an ultimate question left for the jury to decide.

Defendants' seven point of err relies on the fact that this Court permitted the testimony of Chief O'Connell regarding his conclusions and the police investigation. Defendants believe that the testimony regarding his conclusions was not relevant because the filing of criminal charges cannot be the basis of liability. Defendants also believe that, because Chief O'Connell did not conduct the investigation, his testimony was hearsay. Finally, Defendants believe that this Court erred in permitting Chief O'Connell to testify concerning the contents of police reports and the reasons why Plaintiff was not charged.

As to the first claim, this Court has allowed in evidence that Defendants pursuit of criminal charges was based on retaliatory animus and therefore, we find that Chief O'Connell's conclusions concerning whether the criminal offense of eavesdropping took place to be relevant to the issues. Chief O'Connell's testimony regarding the investigation was also properly admitted as it was used to show the effect it had on the listener and was not used to prove the truth of what he was testifying to. The testimony was used to show Chief O'Connell's ongoing course of conduct and was not inadmissible hearsay. The Court also properly allowed Chief O'Connell to testify concerning the content of the police reports and the reasons why Plaintiff was not charged. The cross-examination of the witness did, in fact, open

the door to this testimony and the overruling of Defense Counsel's objection was proper.

In Defendants' eight claim of trial error, Defendants' argue that the Court erred in permitting evidence of supposed acts of post-discharge retaliation. Defendants again argue that this type of activity is protected by the First Amendment and the Noerr-Pennington doctrine. As explained supra, we do not find the Noerr-Pennington doctrine to be a shield for the alleged conduct of Defendants, especially the allegations that Defendants paid Roland Burris money in order to secure criminal charges against Plaintiff. The evidence of post-discharge retaliation was properly admitted and was relevant to show Defendants' retaliatory animus towards Plaintiff.

Defendants argue that this Court erred in permitting Plaintiff to quote Defendant Stroud in closing arguments. Because the testimony Plaintiff read during close was testimony from the Eavesdropping Action, Defendants believe that this was improper and highly prejudicial. However, Defendant did not object to Plaintiff's closing arguments at the time the testimony was being read, and will not be allowed to object on that basis now.

The final two allegations of trial error center on the jury instructions that were given. Defendants believe that the jury instructions did not accurately reflect current due process standards, and did not properly advise the jury that Defendants lawful acts could not be a basis of liability. In giving the jury

the instructions, this Court used the Illinois pattern instruction available to it and we find no reason why this Court must modify those instructions. Also, as this Court has stated on numerous occasions, the supposed lawful acts of Defendants could be used to show Defendants' retaliatory animus towards Plaintiff and therefore, Defendants' proposed jury instructions were not proper and rightfully denied.

Because this Court finds that the alleged errors pointed to by Defendants were correctly ruled upon before and during the trial, we find that when viewed in isolation, prejudiced Defendants and deprived them of fair trial. Similarly, we find that there was no cumulative effect of errors that would justify a new trial. Defendants are allowed to review the transcript of the trial in an attempt to identify other errors that may have prejudiced the proceedings, but as briefed, this Court finds that the jury's verdict was reasonable based on the evidence submitted and we will not disturb it.

ORDER

WHEREFORE, for all the reasons stated:

Defendants' Motion for Judgment Notwithstanding the Verdict, is hereby denied;

Defendants' Motion for a New Trial, is hereby denied; and

Defendants' Motion for a Remittitur, is hereby denied.

/s/
Hon. Allen S. Goldberg

Entered:

July 28, 2006

APPENDIX F

STATE OF ILLINOIS	)	
	)	SS.
COUNTY OF COOK	)	

IN THE CIRCUIT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

JERRI BLOUNT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 01 L 002330
	)	
JOSEPH STROUD, an individual; and JOVAN BROADCASTING, WJYS-TV 62/34, an Illinois corporation,	)	
	)	
Defendants.	)	

ORDER AND MEMORANDUM OPINION

This matter came before the Court on Plaintiff's Petition for Attorneys' Fees and Expenses. The Court having considered all the written and oral submissions hereby finds as follows:

FACTS

This case was tried in front of a jury in November 2005 on Plaintiff's claims of retaliation, defamation, and intentional infliction of emotional distress. On

November 21, 2005, the jury returned a verdict for Plaintiff on her retaliation claim, but a verdict for Defendants on Plaintiff's claims of defamation and intentional infliction of emotional distress. On the retaliation count, the jury awarded Plaintiff $257,350 in back pay, $25,000 for physical and/or emotional pain and suffering, and $2,800,000 in punitive damages. Plaintiff now petitions this Court for an award of $1,162,491.00 in attorneys' fees and $49,724.00 in expenses.

ANALYSIS

Plaintiff petitions this Court to award attorneys' fees and expenses for Plaintiff, as a result of the successful litigation in the above-captioned matter. Plaintiff asserts that she is the prevailing party and is entitled to attorney's fees and costs pursuant to 42 U.C.S. § 1988. In addition, Plaintiff argues that she is entitled to fees for the claims that she did not prevail upon, because these claims arose from a common core of facts. Plaintiff argues that the "common core of facts" claims include all the time and expenses that were spend in defending *Stroud v. Blount*, and the claims upon which Plaintiff did not prevail in Court or which were dismissed from this litigation for one reason or another.

Defendants argue that Plaintiff is not entitled to an award of fees because she did not obtain a judgment under section 1981. Defendants further assert that Plaintiff has failed to satisfy her burden of showing that she is entitled to the fees that she seeks. Finally, Defendants allege that Plaintiff's

request should be denied because it seeks the recovery of fees for unrelated claims on which Plaintiff did not prevail.

We find that Plaintiff did obtain a judgment under 1981. The jury verdict was returned which awarded Plaintiff damages for her retaliation claims. While back pay has yet to be awarded, Plaintiff is still able to move for the Court to determine and enter judgment on back pay under Section 1981. Accordingly, Plaintiff will be awarded reasonable attorneys' fee and expenses as allowed by Section 1988. Plaintiff will also be awarded fees in connection with the claims that arose from a common core of facts such as the fees related to *Stroud v. Blount*. The proceedings from *Stroud v. Blount*, were used in the instant case and did arise out of a common nucleus of facts.

Plaintiff has the burden of proving that the expenses and fees claimed were necessary to achieve the results obtained. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). A petition for fees must specify the services performed, the time expended on them, the attorney who performed them, and the hourly rate charged for the services. *Kaiser v. MEPC American Properties, Inc.*, 164 Ill. App. 3d 978, 984 (1987). Additional factors of relevance include the skill and standing of the attorney involved, the difficulty of the work, the novelty or difficulty of the issues, the importance of the matter, the benefit obtained for the client, and the usual and customary charge for such services. *Id.* at 984. We find that the hourly rate charged by Plaintiff's counsel to be reasonable and

appropriate given the experience of the different attorneys, law clerks and paralegals that worked on the case. Plaintiff received a substantial award in her favor due to the work and effort of Plaintiff's counsel. While the amount of attorney's fees and costs being asked for by Plaintiff is a large amount, given the amount of time and effort spent on the case, and the difficulty and importance of the matter, the award prayed for is reasonable.

After a line-by-line review of Plaintiff's Petition, we find that much of the attorney and paralegal fees were necessary and will be awarded. Some of the vague descriptions such as "Phone call with client" and "Conference with rp," are without a sufficient basis to predicate an award. Without information that allows this Court to determine that the reasonableness of these actions, we cannot determine if these claimed fees were necessary. Therefore, with respect to the fees which are not specific in describing the services performed, we find that Plaintiff has not met her burden and thereby strike these amounts from Plaintiff's Fee Petition. The following is a breakdown of the attorney's fees that will be allowed by this Court:

NAME	HOURS	RATE	AMOUNT
Adam Novak	8.50	50.00	$425.00
Alex Taylor	689.50	170.00	$117,215.00
Alex Taylor	75	160.00	$120.00
Alex Taylor	14.00	50.00	$700.00
Alex Taylor	37.00	0.00	$0.00
Aviana Bowie	3.75	50.00	$187.50
Avianna Bowie	75	50.00	$187.50

Brian Savage	31.00	35.00	$1,085.00
Brian Savage	1.00	0.00	$0.00
Kartik Sharma	23.25	50.00	$1,162.50
Lindsey Daggett	8.75	175.00	$1,531.25
Lindsey Daggett	10.50	75.00	$787.50
Lindsey Daggett	.75	0.00	$0.00
Lucy Vasquez	23.00	100.00	$2,300.00
Mark Schaffner	8.50	475.00	$4,037.50
Mark Schaffner	6.00	0.00	$0.00
Noah Stein	18.50	40.00	$740.00
Noah Stein	2.00	0.00	$0.00
Robert Reiter	4.25	200.00	$850.00
Robin Potter	1434.70	475.00	$681,482.50
Robin Potter	204.00	0.00	$0.00
Valerie Barrett	31.67	50.00	$1,583.50
Vanessa Rodriguez	5.75	50.00	$287.50
Dana Kurtz	2.00	250.00	$500.00
Martin Dolan	863.22	350.00	$302,127.00
Noreen Lennon	24.00	250.00	$6,000.00
Jeremiah Joyce	17.60	300.00	$5,280.00
Myco Dang	108.45	250.00	$27,112.50
Barbara	15.00	75.00	$1,125.00
			TOTAL $1,156,589.2

After reviewing the materials submitted by Plaintiff, we find that "the 'costs' of photocopying, check processing, legal newspaper subscriptions, telephone and delivery services and the like are, more accurately, ordinary 'expenses' which are

normally included in office overhead and, in turn, encompassed within the hourly attorney fee rate charged by the firm" and are therefore not recoverable. *Id.* at 990 (citing *Losurdo Brothers v. Arkin Distributing Co.*, 125 Ill. App. 3d 267 (1984)). Fax fees, copying costs, computerized legal research and telephone costs are among the list of items that will not be included in a granted Petition for Plaintiff's Attorneys' Fees and Expenses. Accordingly, those amounts will be stricken from Plaintiff's petition. The costs awarded to Attorney Robin Potter will be in the amount of $11,304.03, and Attorney Martin Dolan will be awarded costs in the amount of $14,888.82.

Defendants' only dispute about the hourly rate, set forth in the Fee Petition, is that Defendants do not believe the attorneys should be using current hourly rates, as opposed to the hourly rates that were in effect when the attorneys were doing the work. We do not find this argument persuasive and will not compel Plaintiff to compute the hourly rates for attorneys beginning over five years ago, and continuing to this date. This is an onerous task, and is not the type of windfall the court in *Lightfoot v. Walker*, 826 F.2d 516, 523 (7th Cir. 1987) was wary of. Accordingly, the attorneys' fees and expenses will be granted at the hourly rate set forth by Plaintiff in her Petition.

Defendants' also ask this Court to reduce the fee request to reflect the limited success, they argue, that was achieved by Plaintiff. As previously stated, we find that Plaintiff did win a substantial award

and we do not find Defendants' argument to be persuasive. Also, this Court has already reduced the fee request for the reasons discussed above and we do not find it necessary to reduce the request any further.

ORDER

WHEREFORE, for all the reasons stated:

Plaintiff's Petition for Attorneys' Fees and Expenses, is hereby granted in the amount of $1,182,832.10.

/s/
Hon. Allen S. Goldberg

Entered:

September 15, 2006

Order Rev. 9/13/04) CCG 0002

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS

JERRI BLOUNT,	)	
Plaintiff,	)	
v.	)	No. 01 L 2330
	)	
JOSEPH STROUD & JOVAN,	)	
Defendants.	)	

ORDER

This matter coming on to be heard for status and ruling, it is hereby ordered:

(1) Plaintiff is awarded attorneys' fees in the amount of $1,156,589.25 and costs to Robin Potter in the amount of $11,304.03 and $14,888.82 to Martin Dolan;

(2) This order is final and appealable, disposing of all claims of all parties, and there is no just reason for delaying either enforcement or appeal.

Atty. No.: 23522
Name: Robin Potter
Atty. for: Plaintiff
Address: 111 E. Wacker #2600
City/State/Zip: Chicago, IL 60601
Telephone: 312-861-1800

Sep 15, 2006

ENTERED:
/s/
Hon. Allen S. Goldberg

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS.

APPENDIX G

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. 14, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1981

§ 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1988

§ 1988. Proceedings in vindication of civil rights

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act

of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

170

(3)

No. 09-1572

Supreme Court, U.S.
FILED
SEP 7 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JOSEPH STROUD and
JOVON BROADCASTING, WJYS-TV 62/34,

Petitioners,

v.

JERRI BLOUNT,

Respondent.

On Petition For Writ Of Certiorari To The Illinois Appellate Court

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TABLE OF CONTENTS

	Page
Statement of the Case	1
I. The Lower Court's Approval of the Punitive Damage Award Does Not Warrant Review by This Court	7
A. In The Proceedings Below Petitioners Did Not Raise A Constitutional Challenge To Consideration of Counsel Fees In Assessing Whether A Punitive Damage Award Is Excessive	7
B. This Case Does Not Present A Conflict Warranting Review by This Court	16
II. Certiorari Is Not Warranted To Address Any of The *Noerr-Pennington* Issues Raised by The Petition	28
Conclusion	38

TABLE OF AUTHORITIES

Page

CASES:

Action Marine, Inc. v. Continental Carbon, Inc., 481 F.3d 1302 (11th Cir.2007) 21, 23

Baker v. National State Bank, 801 A.2d 1158 (N.J. Super.2002) 20

BE & K Construction Co. v. NLRB, 536 U.S. 516 (2002) 34, 35

Blount v. Stroud, 232 Ill. 2d 302 (2009) 4

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) ..... *passim*

Brandt v. Superior Court, 37 Cal. 3d 813 (1985) 24

Campbell v. State Farm Mut. Auto. Ins. Co., 98 P.3d 408 (Utah 2004) 14, 16, 17, 18

Chasan v. Farmers Group, Inc., 2009 WL 3335341 (Ariz. App. Div. 1) 18

Coker Equipment Co. v. Wittig, 366 Fed.Appx. 729 (9th Cir.2010) 22

Continental Trend Resources, Inc. v. OXY USA, Inc., 101 F.3d 634 (10th Cir.1996) 24

Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) ..... *passim*

Gallatin Fuels, Inc. v. Westchester Fire Ins. Co., 244 Fed.Appx. 424 (3d Cir.2007) 21, 22

Hall v. Cole, 412 U.S. 1 (1973) 27

Hutto v. Finney, 437 U.S. 678 (1978) 27, 28

TABLE OF AUTHORITIES – Continued

Page

International Union of Operating Engineers, Local 150 v. Lowe Excavating Co., 225 Ill. 2d 459 (2006) 8

Laymon v. Lobby House, Inc., 613 F.Supp.2d 504 (D. Del. 2009) 14, 15, 20, 22, 23

Major v. Western Home Ins. Co., 169 Cal. App. 4th 1197 (2009) 24

Parexel Int'l Corp. v. Feliciano, 2008 WL 5101642 (E.D. Pa.) 19

Quigley v. Winter, 598 F.3d 938 (8th Cir.2010) 19

St. Luke Evangelical Lutheran Church, Inc. v. Smith, 318 Md. 337, 568 A.2d 35 (Ct. App. Md. 1988) 25

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) ..... *passim*

United Mine Workers of America v. Pennington, 381 U.S. 657 (1965) 28

Willow Inn, Inc. v. Public Serv. Mut. Ins. Co., 399 F.3d 224 (3d Cir.2005) ..... *passim*

CONSTITUTIONAL PROVISIONS:

U.S. Const., amend. I ..... *passim*

STATUTES:

42 U.S.C. § 1981 ..... 2, 15, 29

42 U.S.C. § 1981a(b)(2) 15, 20

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 1988 ..... *passim*

42 U.S.C. § 1988(b) 13

RULES:

Fed. Rule Civ. Pro. 9(g) 26

Rule 14(g)(i) 7, 32

BRIEFS:

Brief of Amicus Curiae The National Association of Black Owned Broadcasters, Inc. 19, 20, 22

STATEMENT OF THE CASE

(1) Respondent Blount, an African-American woman, was employed by Jovon Broadcasting, a Chicago-area television station, from 1993 until she was terminated in 2000. Petitioner Joseph Stroud, who is African-American, owned Jovon and managed all of its operations.

In 2000 Bonnie Fouts, a white former Jovon employee, filed a charge with the EEOC alleging that while employed at Jovon she had been the victim of racial and sexual harassment, and that she had been fired because she complained about the harassment. Fouts asserted that she had been repeatedly harassed by Rick Howell, a black supervisor, who called her racial and sexual epithets such as "white bitch." (Pet. App. 5a-6a). Fouts asked Stroud on several occasions to intercede and stop the harassment, but Stroud failed to do so.

Shortly after receiving notice of Fouts' EEOC charge, Stroud called a meeting of the Jovon managers. Only African-American managers attended the meeting. At the meeting Blount indicated that she would be "supporting" Fouts in her charge of racial and sexual discrimination because she had witnessed Howell refer to Fouts numerous times as a "white bitch." Stroud admitted that he responded to Blount by stating that he did not understand "how a black person could side with a white person against a black person." (Pet. App. 7a). Stroud stated at the meeting that Fouts had placed the jobs of everyone at Jovon at

risk by filing the EEOC charge, and that there was no place for independent opinions at his company. (Pet. App. 7a).

Several days later Blount met alone with Stroud. Stroud asked Blount what she was going to say about Fouts' claims, and Blount responded that she would not lie. Stroud responded that he did not "get it," and called her an "ignorant nigger." Stroud also told her that she should not "side with" Fouts because "white people" had "done nothing for her," and because she should do what he told her to do. (Pet. App. 7a-8a). Blount in response criticized Stroud for having witnessed the harassment of Fouts and having done nothing. According to Blount, Stroud then started screaming at her and told her that she needed to know whom she was "up against," asserting that he was "one of the richest niggers in the world," and that she did not know whom she was "fucking with." Stroud also stated that he could cause Blount "to cease to exist." (Pet. App. 8a-9a).

Six days after receiving Fouts' EEOC charge, Stroud suspended Blount's employment. Shortly thereafter Stroud fired Blount. (Pet. App. 10a).

(2) In 2001 Blount commenced the instant action in Illinois state court, alleging inter alia that she had been dismissed for opposing racial discrimination. Such retaliation, Blount claimed, violated 42 U.S.C. § 1981. While that lawsuit was pending, Stroud in turn brought a separate civil action against Blount, alleging that she had surreptitiously recorded

several of their conversations. Blount testified that she had done so because she wanted proof that Stroud had told her to perjure herself and had threatened that she would "cease to exist" if she did not. Stroud's eavesdropping suit was ultimately voluntarily dismissed. (Pet. App. 11a).

Stroud also made repeated efforts to have Blount prosecuted for tape recording the conversations. Several Jovon employees filed complaints with the local police department. In addition, Stroud hired then former Illinois Attorney General Roland Burris to assist in these efforts to have Blount prosecuted. Stroud paid Burris $10,000 for his consulting services regarding how criminal charges could be filed against Blount. Stroud stated that an additional $10,000 would have been paid to Burris if these efforts were "successful." (Pet. App. 12a). Local prosecutors, however, declined to press charges against Blount.

At trial of Blount's section 1981 retaliation suit, the defendants denied that they had dismissed Blount in retaliation for her support of Fouts' EEOC charge. To support her contention that the dismissal was retaliatory in nature, Blount offered, inter alia, evidence of the repeated efforts by Stroud and several Jovon employees to have Blount prosecuted. The trial court admitted that evidence, rejecting the objections of the defendants that under the *Noerr-Pennington* doctrine it was constitutionally impermissible to rely on such evidence for the purpose of proving the motive behind the earlier termination. (Pet. App. 103a-105a). A jury found that Blount had been dismissed

by the defendants because of her actions in opposing racial discrimination against Fouts. The jury awarded Blount $257,350 in back pay, $25,000 for physical and/or emotional pain and suffering, and $2.8 million in punitive damages. The trial court subsequently awarded Blount $1,182,832.10 in attorneys' fees under section 1988. 42 U.S.C. § 1988. (Pet. App. 13a).

On appeal the Illinois Appellate Court in 2007 held that the state courts lacked subject matter jurisdiction over Blount's section 1981 claim. The Illinois Supreme Court reversed that decision, and remanded the case for consideration of the defendants' remaining contentions on appeal. *Blount v. Stroud*, 232 Ill. 2d 302 (2009). On remand the Illinois Appellate Court resolved two issues relevant to the instant petition.

(3) The Appellate Court rejected the defendants' contention that the size of the punitive damage award was so excessive that it violated their constitutional right to due process. *See State Farm Mut. Auto. Insurance Co. v. Campbell*, 538 U.S. 408, 417 (2003); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996). (Pet. App. 23-36, 73-83). In reaching that conclusion, the Appellate Court relied on the three factors identified as important by *State Farm* and *BMW*.

First, the Appellate Court concluded that

> Stroud's conduct was significantly reprehensible. Stroud's threats and attempts to use his wealth and power to silence Blount

> compound the allegations of racism and sexism underlying the case and raise it to a level of conduct warranting a significant amount of punitive damages.

(Pet. App. 78a; *see* Pet. App. 28a). The court noted that Stroud had repeatedly threatened Blount.

> Stroud ... threatened Blount, informing her that he could cause her to "cease to exist" and that she "didn't know who she was fucking with." Blount understood these comments to be threats of physical harm or threats on her life.

(Pet. App. 75a-76a). Stroud also sought to exploit the financial vulnerability of Blount and her children.

> Blount was a financially vulnerable single mother of two. Stroud knew this and sought to use her position as the sole provider for her children to persuade her to not support Fouts. Stroud told her that "Bonnie [Fouts] didn't pay your bills," that he did, and that she should do what he said so that she and her children did not "go over a cliff" financially.

(Pet. App. 76a). The petition does not challenge this aspect of the decision below.

Second, the court compared the punitive award to awards in comparable cases. It noted that punitive awards of $2.6 million had been upheld in several other section 1981 cases. (Pet. App. 81a-82a). This

portion of the Appellate Court decision is not challenged in the certiorari petition.

Third, the court compared the amount of the punitive award with the amount of "actual harm" sustained by the plaintiff. When the punitive award was compared with the combined back pay and damages, the ratio was approximately 10 to 1. (Pet. App. 79a). The court reasoned that in assessing the harm sustained by the plaintiff, it could also consider the amount of the counsel fee that had been awarded. When that fee was taken into account, the ratio was only 1.8 to 1, "well within the permissible guideline." (Pet. App. 80a). The certiorari petition relates only to this third aspect of the decision below.

(4) The Appellate Court rejected defendants' contention that it was unconstitutional to admit evidence of their efforts to persuade government officials to prosecute Blount. The defendants did not, of course, contend that the alleged retaliatory dismissal of Blount was itself constitutionally protected. Defendants argued, rather, that they had a constitutional right to attempt to have Blount prosecuted, and that the First Amendment barred plaintiff from relying on evidence about those attempts in order to prove that her dismissal was itself the result of an unlawful purpose. The Appellate Court held that the *Noerr-Pennington* doctrine does not preclude use of evidence regarding protected activity to prove "the purpose ... of the [other] transactions under scrutiny." (Pet. App. 85a (quoting *Pennington*, 381 U.S. at 670 n.3).

(5) The defendants filed a petition for rehearing, asking the Appellate Court to reconsider its initial decision. The Appellate Court subsequently issued a modified opinion, which significantly expanded its discussion of the punitive damage award and the *Noerr-Pennington* issue. (Pet. App. 1a-49a).

The defendants then filed with the Illinois Supreme Court a petition for leave to appeal. The state Supreme Court denied that motion. (Pet. App. 92a). Finally, defendants filed in the Illinois Supreme Court a motion for leave to move for reconsideration of the denial of leave to appeal. That motion too was denied. (Pet. App. 93a).

I. THE LOWER COURT'S APPROVAL OF THE PUNITIVE DAMAGE AWARD DOES NOT WARRANT REVIEW BY THIS COURT

A. In The Proceedings Below Petitioners Did Not Raise A Constitutional Challenge To Consideration of Counsel Fees In Assessing Whether A Punitive Damage Award Is Excessive

Rule 14(g)(i) of this Court requires, when review is sought of a state-court judgment, that a petitioner

> specif[y] ... when the federal questions sought to be reviewed were raised; the method or manner of raising them ... with specific reference to the places in the record where the matter appears ... , so as to show that the

> federal question was timely and properly raised....

Petitioners did not raise in the courts below the constitutional question which they now urge this Court to consider.

The issue of whether counsel fees should be considered in assessing the reasonableness of the punitive damage award arose as a result of post-trial legal developments. The Illinois Appellate Court, in its initial June 24, 2009 opinion, held that the amount of counsel fees that had been awarded to the plaintiff "may be taken into account when assessing the propriety of a punitive award." (Pet. App. 79a).[1] This issue was limited to seven sentences in the

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[1] The Appellate Court relied in part on *International Union of Operating Engineers, Local 150 v. Lowe Excavating Co.*, 225 Ill. 2d 459, 490 (2006). In *Lowe* the plaintiff had not been awarded counsel fees. The Illinois Supreme Court held that where a plaintiff had expended funds to pay counsel, but had not received an award of counsel fees, that expenditure could be considered in deciding how much in punitive damages should be awarded.

> We recognize that the $50,000 awarded here [in punitive damages] does not come close to covering the attorney fees and costs which were incurred throughout the duration of this protracted litigation. While attorney fees can be considered when awarding punitive damages, it is not within the purview of this court to award such fees outright, nor should they be awarded under the guise of a punitive damages award.

225 Ill. 2d at 491. *Lowe* did not address how the courts should deal with a situation in which, as here, there had been such a counsel fee award.

Appellate Court's lengthy analysis of the punitive damage award. (Pet. App. 79a-80a).

Defendants filed a Petition for Rehearing in the Illinois Appellate Court. That petition, however, did not argue that it would be unconstitutional to consider counsel fees in assessing the excessiveness of a punitive award. Rather, it argued only that the Appellate Court's decision rested on a misinterpretation of the particular provision of federal law, 42 U.S.C. § 1988, under which counsel fees had been awarded in this case.

> The Court included attorneys' fees as compensatory damages in the *Gore-Campbell* ratio, overlooking the clearly established law that attorneys' fees awarded pursuant to 42 U.S.C. § 1988 are not compensatory damages. This Court's holding is directly contrary to the plain language of Section 1988 and established precedent, both of which provide that Section 1988 attorney's fees are costs of litigation and not compensatory damages.[2]

The section of defendants' Petition for Rehearing devoted to this issue was headed "Attorneys' Fees Awarded Pursuant to Section 1988 Are Not Compensatory Damages For Purposes Of The Proportionality Ratio."[3] Defendants' argument concerned the proper construction of section 1988, and relied primarily on

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[2] Appellants' Petition for Rehearing, at 1; *see id.* at 4-9.

[3] *Id.* at 4.

decisions interpreting section 1988 as well as "the plain language of the statute and ... congressional intent."[4] Correctly understood, defendants argued, an award of counsel fees under section 1988 was actually "a component of punitive damages.... [A]ttorneys' fees ... should have been added to the punitive side, not the compensatory side .... [which] would result in a ratio of 16:1."[5]

The Appellate Court in its initial decision had relied in part on the Third Circuit decision in *Willow Inn, Inc. v. Public Serv. Mut. Ins. Co.*, 399 F.3d 224 (3d Cir.2005), which had considered an attorneys' fee award under a Pennsylvania statute in upholding the punitive award in that case. (Pet. App. 79a). Defendants did not assert that the reasoning in *Willow Inn* was constitutionally unsound, but instead distinguished *Willow Inn* on the ground that the counsel fee statute in that case was different than section 1988.

> [T]he Third Circuit agreed to include attorneys' fees awarded pursuant to Section 8371 of the Pennsylvania Code as part of the compensatory damages in the *Gore-Campbell* ratio because Pennsylvania courts had held the statute made the fee award a portion of compensatory damages, as a matter of state law.... In contrast to the fees awarded under the Pennsylvania statute in *Willow Inn*, fees

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[4] *Id.* at 6.

[5] *Id.* at 8.

> awarded under Section 1988 are not compensatory.

Nothing in the Petition for Rehearing suggested, as defendants now contend, that *any* inclusion of counsel fees in an excessiveness analysis would be constitutionally impermissible.

In response to the Petition for Rehearing, the Appellate Court issued a modified opinion on October 6, 2009; that opinion included a substantially more detailed discussion of the relevance of counsel fees. (Pet. App. 31a-34a). The new portions of the state court opinion were addressed to the non-constitutional arguments that had been raised in the petition. First, the Appellate Court rejected defendants' suggestion that counsel fee awards under section 1988 should be treated as a form of punitive damages.

> In their petition for rehearing, defendants ... contend that attorney fees should have been counted in the punitive side of the *Gore* compensatory-punitive damage ratio. They assert that this is because the purpose of attorney fees under section 1988 is to punish defendants for wrongful conduct. We disagree. Contrary to defendants' assertions, section 1988 is "remedial" in nature; it is not punitive.

(Pet. App. 31a). Second, the Appellate Court refused to distinguish the Third Circuit decision in *Willow Inn*, reasoning that the Pennsylvania counsel fee

statute at issue in that case served "similar goals" to the purposes of section 1988. (Pet. App. 31a-32a).

Defendants filed a Petition for Leave to Appeal with the Supreme Court of Illinois. The issue which defendants asked the state Supreme Court to decide was whether "[t]he appellate court's decision ignored the language of 42 U.S.C. § 1988, which explicitly provides that attorneys' fees are costs of litigation."[6] This petition argued that a counsel fee award under section 1988 "should have been" treated as punitive damages.[7] Defendants insisted that *Willow Inn* was distinguishable because the Pennsylvania counsel fee statute in that case had been held to be "compensatory damages as a matter of state law,"[8] an argument which necessarily assumed that how counsel fees should be considered turned on the construction of the statute authorizing such awards. The asserted defect in the Appellate Court's analysis, defendants insisted, was that it was "[c]ontrary to the clear congressional mandate" in enacting section 1988.[9] After leave to appeal was denied, defendants filed a Motion for Reconsideration, raising the same non-constitutional argument regarding the interpretation of section 1988. "[I]t was error to treat attorneys' fees awarded under Section 1988 as compensatory

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[6] Petition for Leave to Appeal of Joseph Stroud and Jovon Broadcasting, WJYS-TV 62/34, at 4.

[7] *Id.* 8.

[8] *Id.* at 12 n.1.

[9] *Id.* at 12.

damages. Section 1988 provides for 'a reasonable attorney's fee *as part of the costs*.' *See* 42 U.S.C. § 1988(b) (emphasis added)."[10]

In April 2010, in a Motion to Recall and Stay Issuance of Mandate, filed in the Appellate Court, defendants described the federal question it intended to raise in its then contemplated certiorari petition in the same, statute-specific terms.

> [T]his court ... choos[e] ... to include the award of $ 1,182,832 in attorneys' fees as compensatory damages for purposes of a due process analysis.... Contrary to the court's ruling, the plain language of § 1988 makes clear that "a reasonable attorney's fee [is] *part of costs*," not damages. 42 U.S.C. § 1988(b) (emphasis added).[11]

In its Application for An Extension of Time filed in this Court in April 2010, defendants used the identical language to describe the federal question that the petition would present.[12] The actual certiorari petition

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[10] Motion of Joseph Stroud and Jovon Broadcasting for Reconsideration of the Order Denying Their Petition for Leave to Appeal, at 6; *see id.* at 6-7.

[11] Motion to Recall and Stay Issuance of Mandate Pending Determination of Petition for Writ of Certiorari by The United States Supreme Court, at 3.

[12] Application for An Extension of Time to File Petition for Writ of Certiorari to the Appellate Court of Illinois To and Including June 25, 2010, at 5.

filed only two months later, however, framed a very different question.

In sum, the only federal issue raised by defendants in the litigation below concerned a question of statutory interpretation – whether a counsel fee award under section 1988 (like a fee award under the Pennsylvania statute at issue in *Willow Inn*) should be treated as a form of compensatory damages in assessing the excessiveness of a punitive damage award. None of the briefs filed by defendants in the state courts concerning this issue asserted that it would be unconstitutional to construe or apply section 1988 in that manner. In this Court, for the first time, defendants contend that it would violate substantive due process to consider *any* counsel fee award in assessing whether or not a punitive damage award is excessive. But defendants did not fairly raise any such contention in the courts below.

The petition filed in this Court relies heavily on the Utah Supreme Court decision in *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 419 (Utah 2004); *see* Pet. at 10, 11, 18, 19. But in the proceedings below defendants never referred to *Campbell*. Defendants in this Court insist that "[m]any state and federal trial courts have reached the same conclusion [as *Campbell*]." (Pet. 18-19 n.8). But, with a single exception, defendants never cited any of these cases in their briefs in the Illinois courts. The solitary exception highlights the change in defendants' position. In a single footnote in one brief below defendants mentioned *Laymon v. Lobby House*,

Inc., 613 F.Supp.2d 504 (D. Del. 2009), but they cited that decision as important because (unlike, for example, *Willow Run*), it was "decided under Section 1981."[13] Disavowing the statute-specific approach which they took in the lower courts, defendants no longer distinguish the Third Circuit *Willow Run* as an interpretation of a different counsel fee statute, but now denounce *Willow Run* as constitutionally unsound. (Pet. 20, 22).

The constitutional issue which defendants seek to raise in this Court was not aired in the courts below. In this Court defendants insist that the decision below "*directly* conflicts with decisions of ... this Court" (Pet. 19) (emphasis in original), quoting assertedly controlling passages in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 582 (1996), and *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003). (Pet. 17-18). Because defendants failed to advance this argument in the courts below, the state courts had no opportunity to address it. Defendants contend in this Court that if counsel fees could be considered in assessing the excessiveness of punitive awards, there would be a grave danger of manipulation (Pet. 10, 15); because that argument was not made in the courts below, the Illinois courts

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[13] Appellants' Petition for Rehearing, at 9 n.3. *Laymon* is actually a Title VII sexual harassment case, not a section 1981 case. The relevant portion of the opinion refers to the damages provision of Title VII, which is codified in 42 U.S.C. § 1981a(b)(2). 613 F.Supp.2d at 515.

had no opportunity to assess that contention in light of their own practical experience, or to consider what safeguards might be fashioned to address any such problems. Defendants insist that the circumstances of the instant case are an example of the type of "artificially inflated" counsel fee award that was concocted to provide support for extravagant punitive awards. (Pet. 15-16 n.7). Again, however, the lower courts never were asked to consider that fact-bound contention.

B. This Case Does Not Present A Conflict Warranting Review by This Court

This case does not present the sort of clear, well-established and fully aired conflict that warrants review by this Court. A close reading of the cases relied on by petitioners makes clear that they do not concern a single constitutional issue, but instead involve a number of different non-constitutional and constitutional questions, each of which has so far arisen in only a handful of cases. The decisions relied on by petitioners present a range of different questions, not as petitioners suggest an "array of approaches" to a single constitutional issue. (Pet. 22).

(1) Petitioners contend that the decision in the instant case conflicts with the Utah decision in *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409 (Utah 2004), on remand from this Court's decision in *State Farm*. But *Campbell* is too opaque and

isolated to establish the sort of conflict that would warrant review by this Court.

Campbell did not offer any analysis of the constitutional issue raised by the petition; it merely construed this Court's mandate in *State Farm* itself to require the lower courts on remand in that particular case to use as the denominator in the *BMW/State Farm* analysis the particular jury award in that case.[14] The six-year old decision in *Campbell* remains an isolated result which apparently has not been applied even in Utah. *Campbell's* discussion of counsel fees and punitive damages appears to have been cited on only a single occasion, in an unreported Arizona decision which actually rejected the per se

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[14] 98 P.3d at 419:

> Finally, we turn to the Campbells' claim that costs and attorneys fees incurred in this action, as well as the excess portion of the verdict not covered by insurance, should be included as part of the denominator in calculating a ratio between compensatory and punitive damages. We disagree.
>
> We believe that fairly read, the Supreme Court's opinion forecloses consideration of a compensatory damages number other than the $1,000,000 awarded by the jury.... [T]he considerable attention given by the Supreme Court to ... the methodology for arriving at a constitutionally permissible ratio of compensatory to punitive damages convinces us that we would not be at liberty to consider a substitute denominator.

(Paragraph numbering omitted). Petitioners do not claim that the exclusion of the excess portion of the verdict not covered by insurance, although arguably dictated the mandate of this Court, was constitutionally required.

rule urged by petitioners.[15] The failure of other courts to follow *Campbell* may well stem from the fact that it is unclear what constitutional rule was adopted by the Utah Supreme Court.[16]

Campbell expressed a concern that considering counsel fees when assessing the excessiveness of a punitive award "would substantially alter the manner in which trials are conducted in this state." 98 P.3d at 420. Whatever the Utah-specific nature of those concerns, no other state court has followed this reasoning. *Campbell* predicted that considering counsel fees in assessing the excessiveness of punitive awards would "invite[] unnecessary conceptual and practical complications to an already complex enterprise." *Id.*

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[15] A keycite search for Headnote 11 in *Campbell* identifies only five cases, four of which have nothing to do with the issue in this case. The only relevant decision, *Chasan v. Farmers Group, Inc.*, 2009 WL 3335341 at *10-11 (Ariz. App. Div. 1), held that counsel fees could be considered in assessing the excessiveness of a punitive award if the fees were actually part of the damages awarded by the jury or court.

[16] The first paragraph of the Utah court's opinion recites that it feels bound by the fact that this Court's earlier opinion, in describing the ration of damages to punitive damages, had referred only to the amount awarded by the jury. 98 P.3d at 419-20. Although that might be read to bar consideration of a post-trial award of fees by a court, this reasoning would not address a case in which a jury awarded counsel fees, which a number of states authorize in certain types of cases.

The Utah court also objected on administrative grounds to authorizing juries to make such awards. 98 P.3d at 420. But nothing in the opinion suggests that there would be a constitutional bar to considering such jury awards.

Petitioners do not assert that such intractable administrative problems have in fact arisen; the absence to date of such judicial experience counsels against addressing this issue at this point.

Petitioners also identify two unpublished district court decisions which have disapproved consideration of counsel fees in evaluating the excessiveness of punitive awards. (Pet. 18-19 n.8). District court decisions, of course, do not provide the sort of inter-circuit conflict that might warrant review by this Court. The cursory nature of those decisions, moreover, illustrates the need for far more consideration of this issue by the lower courts.[17]

Petitioners' Amicus asserts that the Eighth Circuit decision in *Quigley v. Winter*, 598 F.3d 938 (8th Cir.2010), held "that attorneys' fees cannot be included as compensatory damages for purposes of calculating the ratio."[18] That is not correct. The opinion in *Quigley* never discussed whether as a matter of constitutional law such fees can be regarded as a form of compensation in the *BMW/State Farm* analysis.[19] The brief for the plaintiff in *Quigley* did not

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[17] In *Parexel Int'l Corp. v. Feliciano*, 2008 WL 5101642 * 6 (E.D. Pa.), for example, the entire discussion is nine words long. "[T]he Court disagrees with the Plaintiff's use of attorney's fees."

[18] Brief of Amicus Curiae The National Association of Black Owned Broadcasters, Inc., at 3.

[19] The amicus elsewhere asserts only that "[if] the Eighth Circuit had included attorneys' fees as compensatory damages ... , it

(Continued on following page)

argue that the counsel fee in that case should be considered in assessing the excessiveness of the punitive award.[20]

(2) A number of the cases which petitioners describe as adopting per se rules for, or against, consideration of counsel fee awards in fact turn on interpretations of particular statutes, and decided only whether a counsel fee awarded under a specific statute should be deemed compensatory in nature. Many of those opinions do not undertake to decide any distinct question of constitutional law.

Baker v. National State Bank, 801 A.2d 1158 (N.J. Super.2002), declined to consider a particular fee award because the New Jersey Law Against Discrimination "specifically includes attorneys fees under a separate section [from the damages provision]." 801 A.2d at 1168 (citing N.J.S.A. 10:5-27.1). *Laymon v. Lobby House, Inc.*, 613 F.Supp.2d 504 (D. Del. 2009), reasoned that it would be improper to consider fee awards in assessing a punitive damage award under Title VII because of the particular definition of compensatory damages provided in a Title VII case. 613 F.Supp.2d at 515 (citing 42 U.S.C. § 1981a(b)(2)). Neither of these cases held that, had

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would have reinstated the entire ... punitive damages awarded." *Id.* at 6. But the Eighth Circuit did not consider counsel fees in this regard, not because it found such consideration would be unconstitutional, but because the plaintiff never asked the court to do so.

[20] Brief of Appellant-Cross-Appellee, 2009 WL 462577.

the statutes authorized treating fee awards as part of compensatory damages, it would have been unconstitutional to do so.

Conversely, the Third Circuit decision in *Willow Inn, Inc. v. Public Service Mut. Ins. Co.*, 399 F.3d 224 (3d Cir.2005), does not hold that it is always proper to consider counsel fee awards when assessing the excessiveness of a punitive award. Rather, *Willow Inn* determined only that such consideration was permissible under a particular Pennsylvania statute regarding bad faith denials of insurance benefits. 399 F.3d at 229 (citing 42 Pa. Cons. St. § 8371), 235 (relying on purpose and language of section 8371). *Willow Inn* relied heavily on a Pennsylvania state court decision which had held that "§ 8371 attorneys fees and costs awards are to be considered compensatory damages." 399 F.3d at 421. *Gallatin Fuels, Inc. v. Westchester Fire Ins. Co.*, 244 Fed.Appx. 424, 437 (3d Cir.2007), is based on an interpretation of the same Pennsylvania statute. *Action Marine, Inc. v. Continental Carbon, Inc.*, 481 F.3d 1302 (11th Cir.2007), considered the counsel fee award in that particular case in the *BMW/State Farm* comparison because

> [i]n Georgia, awards of attorney fees in tort cases involving bad faith are compensatory in nature. *See* O.G.C.A. § 13-6-11 (2006 Supp.), *City of Warner Robbins v. Holt*, 220 Ga. App. 794, 470 S.E.2d 238, 240 (1996) (holding that the purpose of an award of attorney fees and litigation expenses "is to compensate an injured party....")

481 F.3d at 1321 (footnote omitted). None of these opinions purports to decide any constitutional question raised by applying the statutes at issue in this manner.[21]

These two groups of decisions do not conflict; they simply involved interpretations of different statutes. *Laymon*, for example, did not disagree with the decisions in *Willow Inn* and *Gallatin Fuels*, but distinguished them on the ground that they involved a different statute than the provision of Title VII that was the basis of the fee award in *Laymon* itself.

> *Gallatin Fuels* ... and *Willow Inn* ... involve breach of contract and bad faith claims against insurers under 42 Pa.C.S.A. § 8371

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[21] Petitioners' Amicus describes the Ninth Circuit decision in *Coker Equipment Co. v. Wittig*, 366 Fed.Appx. 729 (9th Cir.2010), as holding that attorneys' fees and costs can be "included as compensatory damages for purposes of calculating the ratio." Brief of Amicus Curiae The National Association of Black Owned Broadcasters, Inc., at 4.

But the defendant in *Coker* did not argue that it would be unconstitutional to consider counsel fees in assessing the excessiveness of a punitive award. The defendant's somewhat cursory brief on this issue simply assumed that under Nevada law, which governed that diversity case, counsel fees in an abuse of process case would not be treated as damages. Appellant Coker Equipment Co., Inc's Opening Brief, 2008 WL 5070038 at *28-*30. The Ninth Circuit construed Nevada law to treat fees and costs as part of compensatory damages in an abuse of process case. 366 Fed.Appx. at 733. The defendant in *Coker* never argued that a Nevada law treating fees and costs in this manner could not constitutionally be applied in assessing the excessiveness of a punitive damage award.

> and not Title VII.... The holdings in *Willow Inn* and *Gallatin Fuels* do not address damages in cases of intentional discrimination in employment.

613 F.Supp.2d at 515.

In the instant case the Appellate Court concluded that counsel fee awards under the statute at issue here – section 1988 – should (like the statutes in *Willow Inn* and *Action Marine*) be considered in the *BMW/State Farm* calculus. Petitioners do not suggest that there is an inter-circuit conflict regarding the interpretation of section 1988, and do not contend that certiorari would be warranted merely to construe that particular statutory provision.

(3) Other cases cited by petitioners do not involve court awarded fees at all.

In some states the compensatory damages awarded for certain torts may include an amount for counsel fees. That typically occurs where the underlying tort by its nature is likely to cause the plaintiff to incur counsel fees, and counsel fees are regarded as a foreseeable item of damages just as medical fees would be in a personal injury case.

> This is true in actions for false arrest and malicious prosecution, where damages may include attorney's fees incurred to obtain release from confinement or dismissal of the unjustified charges ... or to defend the prior suit.

Brandt v. Superior Court, 37 Cal. 3d 813, 818 (1985). Where the damage award in such cases includes counsel fees, the lower courts unsurprisingly have assumed that the entire damage award should be considered in the *BMW/State Farm* analysis. *Major v. Western Home Ins. Co.*, 169 Cal. App. 4th 1197, 1224 (2009). (*See* Pet. 21). That issue, of course, is not presented by the instant case.[22]

In *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634 (10th Cir.1996), the Tenth Circuit considered yet another issue, whether in a case in which neither the jury nor the judge has awarded counsel fees, a plaintiff's uncompensated legal expenses can be considered in the *BMW* analysis.

> [P]laintiffs' legal costs no doubt exceeded their compensatory damages award. Nothing in *BMW* would appear to prohibit consideration of the cost of those legal proceedings in determining the constitutionally permissible limits on the punitive damages award.

101 F.3d at 642. That constitutional issue, whatever its merits, also is not presented by the instant case, because here – unlike *Continental Trend* – there was in fact a counsel fee award.

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[22] Petitioners correctly note that the issue in this case is limited to the constitutionality of "inclu[ding] ... court-awarded attorneys' fees as compensatory damages for purposes of calculating the ratio of punitive to compensatory relief." (Pet. 9).

St. Luke Evangelical Lutheran Church, Inc. v. Smith, 318 Md. 337, 568 A.2d 35 (Ct. App. Md. 1988), which predates both *BMW* and *State Farm*, involved a distinct non-constitutional issue. (*See* Pet. 22). There was no counsel fee award in that case at all, and the punitive award was actually smaller than the award of compensatory damages. The question decided in *St. Luke* was whether under Maryland law, with regard to a claim for which an award of counsel fees was not permitted, a jury in determining the size of a punitive award could consider evidence regarding non-reimbursed legal expenses incurred by the plaintiff. That circumstance obviously is not presented here, because in the instant case there was a counsel fee award and because evidence of the plaintiff's legal expenses was never presented to the jury.

(4) Petitioners argue that the decision below conflicts with this Court's decisions in *BMW* and *State Farm*, and is inconsistent as well with a number of other decisions of this Court. That is not correct.

Petitioners rely on a passage in *BMW* in which the Court "compared the punitive damages award to the amount of 'actual harm *as determined by the jury*.' *BMW*, 517 U.S. at 582 (emphasis added)." (Pet. 17). But if this standard, in isolation, established the constitutional standard, it would preclude consideration of compensatory damages awarded by a judge after a bench trial, a result that would effectively bar punitive damages except when a case was tried before a jury. Obviously *BMW* did not establish such a rule,

just as it did not resolve whether and when fee awards could be treated as compensatory for purposes of the *BMW/State Farm* analysis, because neither of those issues was before the Court in *BMW*.[23]

Petitioners also rely on a passage in *State Farm* noting that "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to *the general damages recovered.*" (Pet. 17, quoting *State Farm*, 538 U.S. at 426) (emphasis added by petition). But *State Farm* does not address, for example, whether the "harm to the plaintiff" could include money actually expended by a plaintiff to hire an attorney and pay costs (or a debt incurred by the plaintiff to an attorney). If the *BMW/State Farm* analysis was limited to "the general damages recovered," it would not include special damages, (*see* Fed. Rule Civ. Pro. 9(g)), or compensatory damages that a plaintiff had been awarded but was unable to collect. This Court's decision in *State Farm* cannot fairly be read as encompassing either such constitutional rule.

Petitioners also contend that

> [A]ttorneys' fees may properly be viewed as punitive in nature. In examining statutes that shift a prevailing party's fees such as the one at issue here, the Court has observed

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[23] There is no indication in the opinion of this Court or the Supreme Court of Alabama that attorneys' fees had been awarded in this case.

> that "the underlying rationale of 'fee shifting' is, of course, punitive." *Hall v. Cole*, 412 U.S. 1, 5 (1973); *see also, e.g., Hutto v. Finney*, 437 U.S. 678, 691 & n.17 (1978).

(Pet. 17). That is not an accurate description of the decisions in *Hall* and *Hutto*. *Hall* emphatically did not involve a counsel fee statute, and it did not hold that fee shifting under such statutes is punitive in purpose. The quoted passage actually refers only to non-statutory counsel fees awarded because of the misconduct of a party.

> [F]ederal courts in the exercise of their equitable powers ... may award attorneys' fees when the interest of justice so require.... Thus, it is unquestioned that a federal court may award counsel fees to a successful party where his opponent has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons." 6 J. Moore, Federal Practice 54.77(2), p. 1709 (2d ed. 1972).... In this class of cases, the underlying rationale of "fee shifting" is, of course, punitive, and the essential element in triggering the award of fees is therefore the existence of "bad faith" on the part of the unsuccessful litigant.

412 U.S. at 4-5. Petitioners' quotation from *Hall* omits the key qualifying words "[i]n this class of cases," which refer to (as punitive) only the limited class of cases in which fees are awarded to punish bad faith or vexatious litigation tactics. Similarly, the

counsel fee award referred to in *Hutto* was not based on any statute.[24] Rather, that decision applied "the settled rule that a losing litigant's bad faith may justify an allowance of fees to the prevailing party." 437 U.S. at 689 (footnote omitted); *see* 437 U.S. at 691 ("In this case, the award of attorney's fees for bad faith served the same purpose as a remedial fine for civil contempt.")

II. CERTIORARI IS NOT WARRANTED TO ADDRESS ANY OF THE *NOERR-PENNINGTON* ISSUES RAISED BY THE PETITION

(1) The *Noerr*[25]*-Pennington* evidentiary issue actually litigated in the courts below has already been resolved by this Court's decision in *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965); no compelling reason exists to revisit an issue that has been settled law for decades.

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[24] The portion of *Hutto* referred to by petitioners concerned a fee award of $20,000 based on misconduct by the defendants' counsel in the district court. 437 U.S. at 689-93.

A separate portion of *Hutto* discussed an award of $2500 in counsel fees for work done in the court of appeals. That award was made under 42 U.S.C. § 1988, was not based on bad faith, and was not characterized by the Court as punitive in nature. 437 U.S. at 695-700. This Court instead described the counsel fee award under section 1988 as "*compensating* a successful litigant for the expense of his suit." 437 U.S. at 697 n.27 (emphasis added).

[25] *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

The only cause of action for retaliation asserted in this case was that the defendants had violated section 1981 when they dismissed Blount in reprisal for her having opposed racial discrimination. Petitioners do not contend that the dismissal of Blount for opposing racial discrimination was constitutionally protected action under the *Noerr-Pennington* doctrine. Nor could they plausibly do so. The dismissal of a private employee obviously is not a form of petitioning for redress of grievances.

The actions which petitioners do contend enjoyed protection under the First Amendment occurred only *after* the plaintiff had been dismissed. But plaintiff is not asserting a cause of action for injuries suffered when the defendants attempted to persuade state officials to prosecute her. Blount is not arguing that those efforts were actionable under any federal or state law, or constituted some form of common law tort. The plaintiff did not seek or win any damages for injuries that she might have suffered as a result of those post-termination actions by the defendants.

In the trial of her section 1981 retaliation claim, plaintiff sought to prove that the defendants dismissed her in 2000 because she had opposed racial discrimination against another employee. To support that allegation that there was such a retaliatory motive behind her dismissal, Blount claimed that the defendants remained angry about her opposition to discrimination even after she was fired, and for that reason had in 2001 and 2002 attempted to persuade state officials to prosecute the plaintiff. The

constitutional argument raised by petitioners in the litigation below was that the *Noerr-Pennington* doctrine operates as an absolute bar to use of such evidence to prove the existence of an unlawful motive was behind the earlier dismissal.[26] *Pennington* itself, however, addressed that very issue.

> It would of course still be within the province of the trial judge to admit [evidence of protected activity], if he deemed it probative and not unduly prejudicial, under the "established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny."

United Mine Workers of America v. Pennington, 381 U.S. 657, 670 n.3 (1965) (quoting *Federal Trade Comm'n v. Cement Institute*, 333 U.S. 683, 705 (1948)).

Petitioners acknowledge that there is no conflict among the lower courts regarding whether the *Noerr-Pennington* doctrine permits the introduction of such evidence to establish the motive behind concededly non-protected action. (Pet. 13) ("this rationale does not create a conflict of authority"). Petitioners do not assert that practical experience has demonstrated that application of the rule in footnote 3 in *Pennington* has proven unworkable, or that the rule has been

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[26] *See* pp. 32-33 at n.27, *infra*.

undermined by subsequent decisions of this Court. Footnote 3 is consistent with well established First Amendment principles. The First Amendment, for example, clearly protects the rights of a white supervisor to join the Ku Klux Klan; but if that same supervisor were alleged to have discriminated against a Black, Jewish or Catholic job applicant, his membership in the Klan would assuredly be admissible evidence.

This case presents a singularly inappropriate vehicle for revisiting this issue. During the trial Stroud himself, "during his examination by his own counsel ... stated that the judge who presided over his civil eavesdropping suit told him that he should contact the authorities to bring a criminal claim." (Pet. App. 38a). The court below correctly held that Stroud could not complain about testimony "elicited by defendants' counsel." (Pet. App. 39a). By first introducing evidence regarding Stroud's efforts to have Blount prosecuted, the defendants themselves opened the door to plaintiff's subsequent introduction of additional evidence – less favorable to the defendants – about those efforts.

(2) Even if evidence of otherwise protected activity is not constitutionally inadmissible, petitioners now argue, the courts should admit such evidence "only upon a *heightened showing* that its probative value outweighs the chilling effect on constitutional rights." (Pet. 34-35) (emphasis added). The decision of the Appellate Court below, petitioners argue, applied the "wrong" legal standard when it failed to require

such a heightened showing. (Pet. 34) ("the legal standard applied below is wrong").

But in the courts below the petitioners never argued that the application of any such "heightened showing" requirement was constitutionally required. To the contrary, petitioners repeatedly insisted instead only that the First Amendment precluded the state courts from admitting this evidence under any circumstances.[27] Notwithstanding Rule 14(g)(i) of this

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[27] Defendants' Reply In Support of Their Post-Trial Motion for Judgment Notwithstanding the Verdict, New Trial, and/or Remittitur, at 14:

> Mr. Stroud's pursuit of his legal remedies against Plaintiff ... is protected by the Petition Clause of the First Amendment and the *Noerr-Pennington* doctrine. Accordingly ... this Court erred in permitting Plaintiff to use these acts to support her claims in this case.

Brief of the Defendant-Appellants, Joseph Stroud and Jovon Broadcasting, WJYS-TV 62/34, at 33:

> Stroud's pursuit of his legal rights against Plaintiff ... is protected conduct under the Petition Clause of the First Amendment and the *Noerr-Pennington* doctrine.... The Circuit Court erred in permitting Plaintiff's use of Defendant Stroud's lawful acts to support her claims....

Reply Brief of the Defendant-Appellants, Joseph Stroud and Jovon Broadcasting, WJYS-TV 62/34, at 15:

> Mr. Stroud's pursuit of his legal remedies against Plaintiff ... is protected by the Petition Clause of the First Amendment and the *Noerr-Pennington* doctrine and accordingly, ... the trial court erred in permitting Plaintiff to sue these acts to support her claims of retaliatory animus.

(Continued on following page)

Court, petitioners do not contend that they ever advanced this "heightened standard" constitutional argument in the Illinois courts.

(3) Petitioners insist that the Appellate Court "ruled that *Noerr-Pennington* does not apply here because Stroud's petitioning of criminal law enforcement authorities had ended before the trial in this case." (Pet. 29; *see* Pet. 9 ("[t]he court ... held that *Noerr-Pennington* was inapplicable here because Stroud's efforts to obtain redress through the criminal

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Petition for Leave to Appeal of Joseph Stroud and Jovon Broadcasting, WJYS-TV 62/34 at 16:

> [T]he First Amendment not only guarantees Mr. Stroud's access to the courts, it guarantees that his genuine petitioning will not be used against him at a later date.

Motion of Joseph Stroud and Jovon Broadcasting for Reconsideration of the Order Denying Their Petition for Leave to Appeal, at 3-5:

> A citizen cannot be penalized for exercising his or her First Amendment rights. The appellate court's decision does just that. Mr. Stroud's lawful, proper, and meritorious efforts to obtain redress against Ms. Blount ... were used against him as evidence of retaliatory intent.... The appellate court thought it relevant that Ms. Blount did not sue Mr. Stroud directly for his petitioning activities, but instead used his lawful conduct as evidence of intent to retaliate. That is a distinction without a difference.

Motion to Recall and Stay Issuance of Mandate Pending Determination of Petition for Writ of Certiorari by the United States Supreme Court, at 3-4 (admission of evidence error because the petitioning activity was "privileged under the First Amendment").

justice system had already ceased at the time of trial"); Pet. 12 (same)). Petitioners contend that under the decision below the *Noerr-Pennington* doctrine never applies once the petitioning activity has come to a close.

The petition rests this characterization of the decision below on several excerpts from that opinion.

> The court reasoned that Respondent's introduction of evidence relating to past petitioning could not "thwart the right to seek redress in the court system or through the criminal justice system" because "the State's Attorney [had already] decided that there were no grounds to charge Blount criminally." Pet. App. 43a.... Indeed, the court stated (incorrectly) that "[t]he *Noerr Pennington* doctrine is usually raised as a defense where one party seeks to enjoin another from bringing a suit. Thus, when the part to be enjoined has had his day in court, those concerns are no longer present." *Id.* at 42a....

(Pet. 29-30). This asserted decision limiting *Noerr-Pennington* to efforts to interfere with ongoing petitioning, petitioners argue, conflicts with this Court's decision in *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002) (Pet. 30), and with lower court decisions that hold that *Noerr-Pennington* applies

to "activity that already has come to a close." (Pet. 30).[28]

But petitioners' selective editing of the opinion below omits the key sentence between these two quoted excerpts, in which the Appellate Court expressly does recognize that the *Noerr-Pennington* doctrine can indeed apply to completed petitioning, and which cites *BE & K Construction* for that very rule. "[T]he doctrine may also be applied where a party contends that another party's completed lawsuit is unlawful. *BE & K Construction*, 536 U.S. at 527." (Pet. App. 42a-43a). And the very next (omitted) sentence after the excerpt quoted by petitioners explains that the *Noerr-Pennington* doctrine does not apply here precisely because "Blount does not claim that Stroud's actions in petitioning were unlawful." (Pet. App. 43a).

Petitioners assert that several of this Court's *Noerr-Pennington* cases should be characterized as involving a form of retaliation. (Pet. 26). But the Illinois Appellate Court recognized that the *Noerr-Pennington* doctrine does generally apply in cases (including retaliation cases) involving labor law or business and economic interests. (Pet. App. 40a-41a).

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[28] Pet. 12:

> [T]hat ruling directly conflicts with decisions of this Court and the courts of appeals, which have repeatedly applied *Noerr-Pennington* to completed acts of petitioning.

All of the decisions of this Court relied on by petitioner fall within the categories to which the court below would apply the *Noerr-Pennington* doctrine, and all of those decisions were cited and accepted by that court. Nothing in the decision below suggests that the Appellate Court would refuse to apply the *Noerr-Pennington* doctrine in similar cases.

(4) Petitioner objects that under the reasoning of the court below the *Noerr-Pennington* doctrine would not be applied to a state common law retaliation action which (unlike the instant case) sought damages for petitioning activity that did not involve labor relations or economic interests. (Pet. App. 42a). But neither the decision below not petitioners suggest that there is in fact any such common law action for retaliation under Illinois law.

The plaintiff did not assert that she had a state law cause of action arising out of the defendants' efforts to have her prosecuted. Rather, the only retaliatory act which plaintiff asserted was unlawful, and for which she obtained damages, was her dismissal in violation of section 1981. Defendants have never claimed that that dismissal was itself protected by the *Noerr-Pennington* doctrine. The decision below properly concludes that the *Noerr-Pennington* doctrine is inapplicable to the retaliatory dismissal of the plaintiff, which occurred prior to any activity which the defendants assert is protected by the First Amendment; petitioners do not dispute the correctness of that holding.

The instant case thus does not provide an appropriate vehicle for resolving a hypothetical dispute about the application of dicta in the decision below to some other situation. Regardless of what types of retaliatory acts might be protected by the *Noerr-Pennington* doctrine, and regardless of how the decision below may in the future be construed or applied in other cases, in this case there is simply no claim that the retaliatory dismissal of this plaintiff was itself protected activity under the First Amendment. Certiorari is particularly unwarranted because the dicta to which petitioners object is in the decision of an intermediate appellate court, and would thus be subject to reconsideration by the state Supreme Court should a case ever arise in which that portion of the opinion was outcome-determinative.

CONCLUSION

For the above reasons, the petition for writ of certiorari should be denied.

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172

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IN THE

Supreme Court of the United States

JOSEPH STROUD AND JOVON BROADCASTING,
WJYS-TV 62/34,

Petitioners,

v.

JERRI BLOUNT,

Respondent.

On Petition For Writ Of Certiorari To
The Appellate Court Of Illinois

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

SUMMARY 1

ARGUMENT 2

I. The Questions Presented Are Preserved. 2

II. The Punitive Damages Ruling Merits Review 6

III. The *Noerr-Pennington* Rulings Merit Review. 9

CONCLUSION 13

TABLE OF AUTHORITIES

CASES

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) 8

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930) 3

Campbell v. State Farm Mutual Automobile Insurance Co., 98 P.3d 409 (Utah 2004) 7

Lebron v. National Railroad Passenger Corp., 513 U.S. 374 (1995) 2

Willow Inn, Inc. v. Public Service Mutual Insurance Co., 399 F.3d 224 (3d Cir. 2005) 8, 9

Yee v. City of Escondido, 503 U.S. 519 (1992) 2, 6

STATUTES

42 U.S.C. § 1988 ..... 3, 9

SUMMARY

Respondent's contention that Petitioners did not preserve the questions presented is meritless. Under this Court's preservation standard – which Respondent fails to mention, much less apply – a party may make any argument in support of a claim raised below. Petitioners easily surpass that standard. Not only did Petitioners raise the relevant claims below, they made essentially the same arguments as set forth in the Petition. Respondent's contrary assertions, which mischaracterize the record and the law, represent a misplaced attempt to forestall the Court's consideration of important issues of constitutional law on which lower courts are divided.

On the merits, Respondent fails to refute Petitioners' showing of a conflict on the first question presented, regarding treatment of court-awarded attorneys' fees under the *State Farm* and *BMW* due process analysis. Respondent's arguments simply highlight the confusion in the lower courts. And Respondent does not and cannot deny that resolution of this conflict is critical to safeguarding the constitutional right against disproportionate punitive damages awards – as this case vividly illustrates. Indeed, Respondent makes no attempt to defend the analysis below, which plainly is at odds with the *State Farm*-*BMW* framework.

On the second question presented, Respondent incorrectly suggests the court below did not say what it in fact said when it rejected Petitioners' *Noerr*-*Pennington* objection to the admission of prejudicial testimony concerning Petitioners' First Amendment

activity. The lower court unambiguously rejected *Noerr-Pennington* based on its erroneous rulings that the doctrine applies neither to retaliation claims nor to past petitioning. Those rulings plainly create conflicts of authority. As for the court's third reason for rejecting *Noerr-Pennington* – that the testimony was offered in support of a claim based on other conduct – Respondent contends this ruling is not worthy of review because it was addressed by a footnote in *Pennington*. But as the Petition showed, and Respondent does not contest, that footnote was dictum that is not binding on this Court, yet forestalls the ordinary process of development of the law in the lower courts. As such, this Court should address the issue in this case, where it is actually presented, to protect this core First Amendment right against the chilling effect of the rulings below.

ARGUMENT

I. The Questions Presented Are Preserved.

In an effort to forestall the Court's consideration of the important constitutional questions presented, Respondent's primary argument is that Petitioners "did not raise in the courts below the constitutional question[s] which they now urge this Court to consider." Opp. 8. But Respondent fails to mention, much less apply, the Court's preservation standard: "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992); *accord Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

Petitioners went far beyond what is required under *Yee*. Not only did Petitioners raise the relevant claims below, they pressed the main arguments set forth in the Petition for Certiorari.

1. With respect to the first question presented, both Petitioners' *and* Respondent's initial submissions to the Illinois Appellate Court *excluded* attorneys' fees from the *State Farm-BMW* comparison of compensatory and punitive damages – treatment consistent with Petitioners' position before this Court. *See* Pet. 6-7. Accordingly, the precise question presented here did not arise until the Appellate Court *sua sponte* added attorneys' fees to compensatory damages when performing the due process ratio analysis. Petitioners then timely raised their due process objection to that treatment of the fees – first in seeking rehearing in the Appellate Court, and again in seeking discretionary review in the Illinois Supreme Court. *See* Appellants' Pet. for Rehearing 1, 4-9 (Ill. App. Ct.); Pet. for Leave to Appeal 8 (Ill. Sup. Ct.). "The additional federal claim thus made [in seeking rehearing] was timely, since it was raised at the first opportunity." *Brinkerhoff-Faris Trust & Savs. Co. v. Hill*, 281 U.S. 673, 678 (1930).

Respondent's argument that the "only federal issue" Petitioners raised below "concerned a question of statutory interpretation" under 42 U.S.C. § 1988 (Opp. 14) is contradicted by the quotations in Respondent's own brief, which state that treating fees awarded under § 1988 as compensatory damages is an erroneous application of "'the *Gore-Campbell* [*i.e.*, *BMW-State Farm*] ratio.'" Opp. 9 (quoting

Appellants' Pet. for Rehearing 1). In the Appellate Court, Petitioners elaborated: "If attorneys' fees had been properly excluded from the *Gore-Campbell* calculus, the ratio of punitive [to compensatory] damages would have been nearly 10:1, which strays far beyond the proper constitutional benchmark of 1:1." Appellants' Pet. for Rehearing 3-4. Likewise, Petitioners sought review in the Illinois Supreme Court on the ground that under *BMW* and *State Farm*, "a punitive damage award [must] be proportional to the actual harm suffered by the plaintiff," and that attorneys' fees as costs may not be considered compensatory under this analysis "because they do not provide a remedy for the injury or harm that gave rise to the suit." Pet. for Leave to Appeal, at 8-9; *see also* Mot. for Reconsideration 7 (Ill. Sup. Ct.).[1]

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[1] Respondent also cites pleadings filed after the state court decisions became final. Opp. 13. Although these later pleadings should not be relevant to whether the issues were timely presented in the courts below, Respondent's selective "quotation" and characterization of the later pleadings underscores the Opposition's reckless approach to the record. When the parts omitted by Respondent are included, these pleadings plainly make the same argument presented in the Petition:

> [T]he decision below raises serious due process concerns regarding the amount of punitive damages. The United States Supreme Court has held that although the constitutionality of punitive damages awards cannot be reduced to a mathematical formula, the ratio of compensatory damages to punitive damages is a critical factor. Here, the jury awarded $2,800,000 in punitive damages. Even assuming that back pay

To be sure, one aspect of Petitioners' argument has always been that even if attorneys' fees may be included on the compensatory side of the due process ratio when the fees were awarded by the factfinder as damages under the substantive law, it violates due process to count attorneys' fees as compensatory damages when they were awarded by the court as costs, as occurred here pursuant to § 1988. But that is the very same argument Petitioners make to this Court in seeking certiorari. *See* Pet. 16-17. The Court might adopt a rule excluding attorneys' fees from the due process ratio in all cases, as some courts have done, or allow fees to be counted as compensatory damages only when the substantive law so provides, as other courts have held. *Id.* But under either rule, the approach of the court below violates the Constitution.

> constitutes compensatory damages (rather than equitable relief), the total compensatory damages plus back pay awarded amounts to only $282,350, leading to an extreme 10:1 ratio of punitive damages compared to harm actually suffered. But [the Appellate] Court did not analyze the ratio in this way, choosing instead to include the award of $1,182,832 in attorneys' fees as compensatory damages for purposes of a due process analysis. [The Appellate] Court therefore upheld the punitive damages award because it resulted in "only" a 1.8:1 ratio. Contrary to the court's ruling, the plain language of § 1988 makes clear that "a reasonable attorney's fee [is] part of the costs," not damages.

Mot. to Recall and Stay 3 (Ill. App. Ct.) (citations omitted); *see also* Appl. for Extension of Time 5 (U.S.).

2. Respondent's assertion that the second question presented was not preserved is equally baseless. The Appellate Court expressly found that Petitioners preserved their *Noerr-Pennington* objection to admission of evidence concerning lawful petitioning of criminal justice authorities for redress against Respondent's violation of Illinois's criminal eavesdropping law. Pet. App. 39a.[2] In arguing non-preservation, Respondent focuses on a single alternative argument in the Petition concerning only one of the three erroneous *Noerr-Pennington* rulings challenged here: the argument that even if *Noerr-Pennington* permitted evidence of constitutionally protected petitioning in some circumstances, there must still be a heightened showing that the probative value of such evidence outweighs the prejudice to First Amendment rights. Pet. 34-35; *infra* at 11; Opp. 32-33 & n.27. But as Respondent concedes, Petitioners' primary argument below – as in this Court – was that *Noerr-Pennington* always precludes admission of such evidence. Opp. 32. Offering a fallback argument in support of the same claim – that *Noerr-Pennington* at least requires exclusion of the evidence in this case, even if not in every case – is proper. *See Yee*, 503 U.S. at 535.

II. The Punitive Damages Ruling Merits Review.

On the merits, Respondent has failed to refute Petitioners' showing that the Illinois court's punitive

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[2] In so ruling, the Appellate Court rejected Respondent's contention (Opp. 31) that, by eliciting certain *other* testimony relating to petitioning of *civil* law authorities, Petitioners opened the door to allowance of the testimony at issue here.

damages ruling under *State Farm* and *BMW* warrants review. At the outset, Respondent does not and cannot deny that this question is critically important. By counting court-awarded attorneys' fees as compensatory relief, the court below radically skewed the *State Farm-BMW* quantitative analysis. In this very case, the attorneys' fees dwarfed the actual compensatory relief awarded by the jury; indeed, the trial court made its fee award long after the jury's verdict. *See* Pet. 15. Allowing the trial court to artificially inflate the "compensatory relief" by adding its own fee award to the factfinder's damages award would render the quantitative guideposts established by this Court essentially meaningless.

Respondent's contention that there is no conflict of authority concerning this vital question is patently incorrect. Respondent asserts that the Utah Supreme Court's remand decision in *State Farm* is "too opaque" to give rise to a direct split with the decision below. Opp. 16. But there is nothing "opaque" about the Utah Supreme Court's holding that "attorney fees" may not be "included as part of the denominator in calculating a ratio between compensatory and punitive damages." *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 419 (Utah 2004). The court below held just the opposite: "attorneys fees should be taken into account as part of the compensatory damages factor in the *Gore* analysis." Pet. App. 30a. The two courts reached polar opposite conclusions on the question presented. The conflict is clear.

Respondent's further suggestion (Opp. 17) that the Utah court was simply interpreting this Court's mandate just serves to reinforce the conflict between the decision below and this Court's precedents. *See* Pet. 17-19. Nonetheless, Respondent argues (Opp. 25) that this Court's decisions cannot be taken at their word when they direct quantitative comparison of punitive damages to the "actual harm as determined by the jury," *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 582 (1996), because that rule would purportedly bar punitive damages in a bench trial. That is merely a debater's point, as the Court self-evidently used the word "jury" as shorthand for "factfinder." At the same time, the substance of the Court's holdings is unmistakable: punitive damages must be compared to the actual harm reflected in the factfinder's verdict under the substantive law. *See* Pet. 17-18. The decision below conflicts with that rule.

The remainder of Respondent's argument concerning the first question quarrels with Petitioners' reading of certain lower court cases. But none of those quibbles alters the fundamental point that there is a conflict and an array of approaches in the lower courts. For example, Respondent takes issue with Petitioners' discussion of *Willow Inn, Inc. v. Public Service Mutual Insurance Co.*, 399 F.3d 224 (3d Cir. 2005), in which the Third Circuit (like the Illinois court below, which relied on *Willow Inn*) counted attorneys' fees as compensatory damages under *State Farm* and *BMW*. The Petition for Certiorari stated that *Willow Inn* applies the same rule as the decision below because the attorneys' fees

were "awarded by the court as collateral relief." Pet. 19-20. Respondent disagrees and argues that the Third Circuit's treatment of the fees as compensatory relief actually turned on its reading of the substantive Pennsylvania statute that applied, under which "fees . . . are to be considered compensatory damages." Opp. 21 (citing *Willow Inn*, 399 F.3d at 421). Assuming that Petitioners' reading of *Willow Inn* is the better one, it merely heightens the conflict of authority, because it moves *Willow Inn* from agreeing with the decision below to conflicting with it. According to Respondent, the Third Circuit permits fees to be counted as compensatory relief in the due process analysis only when the fees are awarded by the factfinder as compensatory relief under the applicable substantive law. *See* Pet. 20-21 (identifying other cases taking this approach). That is contrary to the decision below, which included court-awarded fees even though the substantive law plainly defines them as "costs." 42 U.S.C. § 1988.

In short, the existence of a substantial conflict between the decision below and other decisions from federal appellate and state supreme courts is undeniable. This Court should provide the guidance needed on this important issue.

III. The *Noerr-Pennington* Rulings Merit Review.

Respondent also fails to refute Petitioners' showing that the Illinois court's *Noerr-Pennington* rulings warrant the Court's review. As the Petition explains, the decision below includes three certworthy rulings rejecting *Noerr-Pennington*. Pet. 23-36. Respondent begins with the third ruling:

that the evidence of protected petitioning was introduced to hold Petitioners liable for other conduct, rather than imposing liability for the First Amendment activity as such. Respondent contends this ruling is "settled law" because it was addressed in a footnote in *Pennington*. Opp. 28-30. But that contention ignores the central point of the Petition about this issue: the *Pennington* footnote is pure dictum, which constrains the lower courts but not this Court. Pet. 33-34. The existence of that dictum makes the case for certiorari on this issue especially compelling because it blocks percolation of the issue in the lower courts and can only be corrected by this Court. At the same time, because the dictum lacks stare decisis effect, there is no need to show unworkability or the other factors demanded by Respondent (Opp. 30-31), which are relevant only when the Court reconsiders prior holdings with precedential force. *See* Pet. 33.

This very case shows how the rule adopted below, and suggested by the *Pennington* dictum, subverts fundamental rights. Petitioner Stroud petitioned criminal justice officials two full years after Respondent's alleged retaliatory discharge. Pet. 5. That First Amendment conduct shows only that Petitioner was trying to enforce his rights under Illinois criminal law; it has no relevance to the long-past discharge. Yet the courts below allowed evidence of it to inflame the jury's passions, as reflected in an enormous and disproportionate punitive damages award. The suggestion that Petitioners have not been punished for constitutionally protected activity blinks reality.

Respondent argues that evidence of First Amendment activity might be relevant in other cases, such as where a white supervisor is a member of the Ku Klux Klan and fires a minority employee. Opp. 31. But even assuming that such evidence were ever admissible, it would only be so where its probative value greatly outweighed its prejudicial and chilling effect on First Amendment rights. Multiple courts have so held. Pet. 35-36. Under any constitutional rule, the evidence should not have been admitted against Petitioners here. The Court should revisit the *Pennington* dictum to guard against further encroachments on this core right.

The logic of Respondent's arguments concerning the Illinois court's other two *Noerr-Pennington* rulings is difficult to follow, but appears to be that the court did not mean what it said. Respondent nowhere denies that the Appellate Court's refusal to apply *Noerr-Pennington* to petitioning that has already been completed creates a split with this Court and with numerous courts of appeals. *See* Pet. 30-32. Instead, Respondent contends the Appellate Court did not refuse to apply *Noerr-Pennington* to completed petitioning activity. Opp. 34-35. That is incorrect. To be sure, the Appellate Court recited that "the doctrine may also be applied where a party contends that another party's completed lawsuit is unlawful." Pet. App. 42a-43a. But then, ignoring that principle, the court rejected Petitioners' *Noerr-Pennington* objection on the very ground that "defendants have already had their 'day in court' on their civil eavesdropping claim against Blount, and the State's Attorney decided that there were no

grounds to charge Blount criminally." Pet. App. 43a. Whatever passing lip service the court may have paid to *Noerr-Pennington*'s applicability to completed conduct, it applied a very different rule of decision here, in conflict with numerous other courts.

As for the Appellate Court's first *Noerr-Pennington* rationale – that the doctrine does not apply to retaliation claims – Respondent again does not contest that this ruling conflicts with the decisions of this Court and multiple courts of appeals. *See* Pet. 25-29. Instead, Respondent engages in verbal contortions to argue that this is not actually what the court below held. Respondent's arguments cannot be squared with the court's opinion. Respondent never mentions the operative language of the Appellate Court's ruling, which is unmistakably clear: the court "decline[d] to extend the applicability of the *Noerr-Pennington* doctrine to provide immunity from retaliation claims." Pet. App. 41a-42a. Given this plain language, Respondent's claim (Opp. 36) that "[n]othing in the decision below suggests that the Appellate Court would refuse to apply the *Noerr-Pennington* doctrine in similar cases," including "retaliation cases," is inexplicable.[3]

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[3] Respondent also misleadingly contends that the Appellate Court "recognized that the *Noerr-Pennington* doctrine does generally apply in cases (including retaliation cases) involving labor law or business and economic interests." Opp. 35. But to underscore its view that the doctrine does *not* apply in *other* cases, the court below stated: "Notably, the United States Supreme Court has never applied the doctrine in a case that did not involve the Sherman Act, the National Labor Relations Act, or business and economic interest disputes between competitors." Pet. App. 40a.

The *Noerr-Pennington* rulings below plainly merit review.

CONCLUSION

The petition should be granted.

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166

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In the
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JOSEPH STROUD AND JOVON BROADCASTING,
WJYS-TV 62/34,
Petitioners,

v.

JERRI BLOUNT,
Respondent.

On Petition for Writ of Certiorari to
The Appellate Court of Illinois

BRIEF OF AMICUS CURIAE THE NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS, INC. IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. This Court Should Grant Certiorari to Resolve Inconsistent Decisions of the Lower Courts 4

CONCLUSION 8

TABLE OF AUTHORITIES

Cases: Page

BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996) 3, 4, 5, 7

Coker Equipment Co. v. Wittig, 2010 U.S. App. LEXIS 2984 (9th Cir. February 16, 2010) 6

Quigley v. Winter, 598 F.3d 938 (8th Cir. 2010) 5, 6

State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003) 3, 4, 7

INTEREST OF AMICUS CURIAE[1]

The National Association of Black Owned Broadcasters ("NABOB") is a non-profit trade association organized and doing business under the laws of the District of Columbia. NABOB is the first and largest trade organization representing the interests of African-American owners of radio and television stations across the country. NABOB was organized in 1976 by a small group of African-American broadcasters who desired to establish a voice and a viable presence in the industry and to address specific concerns facing African-American broadcasters.

NABOB has two principal objectives: First, to increase the number of African-American owners of telecommunications facilities, and second, to improve the business climate in which they operate. The overall objective is to maximize the potential for financial success through providing advocacy resources and information in critical business areas including, advertising sales, station acquisition, financing, and

[1] Pursuant to Rule 37.3(a), counsel of record for Petitioner and counsel for Respondent below (no counsel of record for Respondent having yet entered an appearance before this Court) were notified of NABOB's intent to file an amicus brief 10 days prior to the due date of this amicus brief. Copies of the parties' consents to the filing of this brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members or its counsel made a monetary contribution to its preparation or submission. Petitioner Jovon Broadcasting, WJYS-TV, 62/34, as a member of NABOB, pays annual dues which are not allocated to any particular activity of NABOB.

federal broadcast regulation. In 1976, there were only 30 African-American owned broadcast facilities in the United States. Today, there are over 220.

Despite NABOB's many accomplishments, its work is never complete. Although constituting 14% of the total population, African-Americans own approximately 2% of all commercial broadcast licenses in the United States. Economic and political empowerment in the African-American community cannot be achieved without access and control over the mass media resources that impact our lives and the world. NABOB is dedicated to creating opportunities for success for African-Americans in the telecommunications industry.

Respondent Blount's counsel conditioned Ms. Blount's consent to the filing of this amicus brief on NABOB's disclosure of "any current or past relationship between NABOB and the petitioners, their companies or affiliated companies, or any officials or employees of those companies." July 20, 2010 letter from Robin Potter to Walter Diercks, submitted to the Clerk of the Court. As noted in footnote 1 above, Jovon Broadcasting, WJYS-TV, 62/34 is a dues paying member of NABOB and has been for many years. Petitioner Joseph Stroud was a member of the Board of Directors of NABOB from 1994 to 1999.

As the owner of a member of NABOB and as a former director, Mr. Stroud has participated in a number of NABOB-related activities and is well-known to many members and directors of NABOB, who have known him as an honorable and ethical broadcaster and business owner. This knowledge of

Mr. Stroud's personal integrity has heightened the concern of NABOB and its members. This conflict among the courts as to whether attorneys' fees can be considered in determining whether an award of punitive damages is constitutional has created uncertainty and an incentive to forum shop which may subject any business owner to wildly different liability depending on where a suit is brought.

As shown below, NABOB believes that this Court should grant the instant petition and resolve the conflict between the lower courts.

SUMMARY OF ARGUMENT

The petition for a writ of certiorari should be granted because the lower courts have not consistently applied this Court's holding in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), with some courts holding that attorneys' fees cannot be included as compensatory damages for purposes of calculating the ratio of punitive damages to compensatory relief under *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), and with other courts permitting inclusion of attorneys' fees as compensatory damages for purposes of calculating the ratio under differing criteria for inclusion. Indeed, NABOB has identified two recent conflicting cases in addition to those cited by Petitioners, one from the United States Court of Appeals for the Eighth Circuit holding that attorneys' fees cannot be included as compensatory damages for purposes of calculating the ratio, and the other from the United States Court of Appeals for the Ninth Circuit, holding that attorneys' fees can be

included as compensatory damages for purposes of calculating the ratio.

This conflict among the lower courts has real world consequences for defendants. If a defendant were to be successfully sued for compensatory damages, punitive damages and attorneys' fees, the amount of punitive damages that could be awarded consistent with this Court's holdings in *BMW* and *State Farm* could vary wildly, depending on where and in which court the NABOB member happened to get sued.

The fact that at least two conflicting decisions from the Eighth and Ninth Circuits have been issued so far in 2010 demonstrates that conflicting interpretations of this Court's holdings in *BMW* and *State Farm* are spreading to additional courts and that it is highly unlikely that the conflicts will be resolved without the intervention of this Court.

ARGUMENT

I. This Court Should Grant Certiorari to Resolve Inconsistent Decisions of the Lower Courts

Petitioners' petition for a writ of certiorari demonstrates that the lower courts have not consistently applied this Court's holding in *State Farm*, with some courts holding that attorneys' fees cannot be included as compensatory damages for purposes of calculating the ratio of punitive damages to compensatory relief under *BMW*, with other courts permitting inclusion of attorneys' fees as compensatory

damages for purposes of calculating the ratio under differing criteria for when attorneys' fees can be included in the calculation. Indeed, as will be shown immediately below, the conflict among the lower courts is even worse than shown in Petitioners' petition.

NABOB has identified two conflicts among the lower courts in addition to those already identified in Petitioners' petition. In *Quigley v. Winter*, 598 F.3d 938 (8th Cir. 2010), the Eighth Circuit, in reviewing an award under the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* and the Iowa Civil Rights Act, *Iowa Code ch. 216*, used a four to one ratio between compensatory damages and punitive damages to determine the constitutionally permissible punitive damages. The jury had awarded actual damages of $13,685 and punitive damages of $250,000. The trial judge awarded attorneys' fees and costs in the amount of $21,1587.50 and reduced the punitive damages to $20,527.50 (1.5 times the compensatory damages award of $13,685). *Quigley v. Winter*, 598 F.3d at 953.

The Eighth Circuit agreed that the punitive damage award of $250,000 was excessive because it was eighteen times the compensatory damages award of $13,685. *Ibid.*, 598 F.3d at 955. After completing its review of the three factors for assessing the reasonableness or excessiveness of a punitive damage award established by this Court in *BMW*, 517 U.S. at 575, 580-81 583, the Eighth Circuit concluded that punitive damages in the amount of $54,750 was appropriate: "This amount is four times greater than Quigley's compensatory damages ($13,685.00), which we find to be the appropriate ratio under the circumstances of this case." *Id.*, 598 F.3d at 955-56.

After approving punitive damages in the amount of four times the compensatory damages of $13,685, the Eighth Circuit then addressed the proper amount of attorneys' fees and costs to be awarded the plaintiff. The Court concluded that a reasonable amount of attorneys' fees in the case was $78,044.33 and instructed the district court to award the plaintiff $78,044.33 in attorneys' fees, together with $1,587.88 in non-taxable costs. *Id.*, 598 F.3d at 958. If the Eighth Circuit had included attorneys' fees as compensatory damages in its four to one ratio calculation for reasonableness, it would have reinstated the entire $250,000 in punitive damages awarded the plaintiff by the jury, since the ratio of the $250,000 to the total of compensatory damages and attorneys' fees ($91,729.33) was far less than four, and indeed was less than 2.75.

In the second case identified by NABOB, the Ninth Circuit has adopted the exact opposite of the approach used by the Eighth Circuit in *Quigley v. Winter*. In *Coker Equipment Co. v. Wittig*, 2010 U.S. App. LEXIS 2984 (9th Cir. February 16, 2010), the Ninth Circuit considered a case in which the district court did not award any compensatory damages for abuse of process, but instead only awarded attorneys' fees of $50,000 and $5,000 in costs, together with $20,000 in punitive damages. The Ninth Circuit held that attorneys' fees and costs "can constitute compensatory damages for abuse of process," and thus "the ratio of punitive damages to compensatory damages was not excessive." *Coker Equipment Co. v. Wittig*, 210 U.S. App. LEXIS 2984 at *8.

These two conflicting decisions cited above are in addition to the conflicting decisions cited in the Petition. These conflicting decisions cannot be reconciled with one another. The fact that at least two conflicting decisions from the Eighth and Ninth Circuits have been issued so far in 2010 demonstrates that conflicting interpretations of this Court's holdings in *BMW* and *State Farm* are spreading to additional courts and that it is highly unlikely that the conflicts will be resolved without the intervention of this Court.

This conflict among the lower courts is not just an intellectual curiosity. It has real world consequences for defendants.[2] The concerns of NABOB members are illustrative. For example, through its subsidiaries, one NABOB member owns or operates radio stations in 11 states and the District of Columbia, many of which broadcast into multiple states located in different federal courts of appeals circuits. It also owns other businesses which operate nationwide. If this NABOB member were to be successfully sued for compensatory damages, punitive damages and attorneys' fees, the amount of punitive damages that could be awarded consistent with this Court's holdings in *BMW* and *State Farm* would vary wildly, depending on where the NABOB member happened to get sued. The extent of punitive damage exposure consistent with the Constitution of the

[2] NABOB is considering the issue from the point of view of defendants because its members are concerned about the economic implications of inconsistent lower court decisions on whether attorneys fees should be included as compensatory damages when considering whether the amount of a punitive damage award is constitutional. A large punitive damage award can threaten the viability of many, if not most, businesses.

United States thus is subject to the happenstance of where a defendant is sued.

Such wildly different results under interpretations of the Constitution of the United States depending on the happenstance of where a suit is brought are antithetical to our form of constitutional government and can be prevented by this Court by the granting of certiorari in this case. Therefore, this Court should grant the petition for a writ of certiorari and resolve the present and growing conflict among the decisions of the lower courts.

CONCLUSION

For the foregoing reasons, in addition to those presented by the Petitioners, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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